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IN THE

Supreme Court of the United States

October Term, 1958

No. 1095

JOHN AARON, *et al.*,

Petitioners,

—v.—

WILLIAM G. COOPER, *et al.*, Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that this Court issue a writ of certiorari to review the judgment of the District Court of the United States for the Eastern District of Arkansas, entered in the above-entitled cause on the 21st day of June 1958 before judgment is rendered thereon by the United States Court of Appeals for the Eighth Circuit.

Citations to Opinions Below

The opinion of the District Court is not reported, having been rendered by that court on the 21st day of June 1958. A copy of said opinion is appended hereto in the Appendix

(App. 23). The Order also filed on the 21st day of June 1958 is set forth in the Appendix (App. 21).

Jurisdiction

The judgment of the District Court of the Eastern District of Arkansas was entered on June 21, 1958 (App. 21). Application to said court for stay of execution of the judgment was denied on June 23 (App. 62). Appeal was docketed in the United States Court of Appeals for the Eighth Circuit on June 24, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1) and 28 U. S. C., Section 2101(e) this being a petition for writ of certiorari to the Court of Appeals for the Eighth Circuit before judgment of said court.

1. Rule 20 of the Revised Rules of the Supreme Court of the United States provides that a writ of certiorari to review a case pending in the Court of Appeals before judgment is given in such court will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court.

2. Under the heading "Reasons for Granting the Writ" there is set forth the reasons why an immediate decision by this Court is of such great public importance.

3. For cases in which this Court has granted petition for writ of certiorari in advance of judgment of the Court of Appeals see *Girard* v. *Wilson*, 354 U. S. 524; *Insurance Group Committee* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607; *Gay* v. *Ruff*, 292 U. S. 25, 30; *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U. S. 579 and other cases cited in Rule 20. For a thorough discussion of the background of Rule 20 and 28 U. S. C., Section 1254(1) and

instances in which the predecessors of the rule and statute have been applied, see the Government's Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit and Brief in Support Thereof in *United States* v. *Bankers Trust Co.*, Nos. 471 and 472, October Term, 1934, p. 9 *et seq.* And see Stern and Gressman, Supreme Court Practice (1954 ed.) 13-14, 131-132.

Question Presented

Whether an order of a District Court, affirmed by a Court of Appeals approving a plan for gradual desegregation of public schools which plan has been in operation for a year can be suspended and Negro children already in desegregated schools forced to withdraw to segregated schools upon a showing of certain hostile incidents within the school and opposition of portions of the local public to the decision of this Court in *Brown* v. *Board of Education*, 347 U. S. 483.

Statement

This cause was originally filed in the District Court in 1955 by the petitioners herein in which they sought an order directing respondents to desegregate the public schools of Little Rock, Arkansas. The respondents submitted to the court a plan for the gradual desegregation of the schools which was approved. *Aaron* v. *Cooper*, 143 F. Supp. 855 (E. D. Ark. 1956).

The plan, in essence, consisted of a three phase desegregation program, i.e., first, the desegregation of the high schools, followed by desegregation of the junior high schools, and the elementary schools, covering a period of approximately eight years. Petitioners, being dissatisfied with the order of the District Court approving the plan,

appealed to the United States Court of Appeals which affirmed. 243 F. 2d 361 (C. A. 8, 1957).

The District Court retained jurisdiction of the case for the purpose of entering such other and further orders as might be necessary.

In August 1957, a Mrs. Clyde Thomason, a white person, filed a suit against respondents in the Chancery Court of Pulaski County, Arkansas for the purpose of enjoining them from putting their plan into operation. This resulted in the issuance of a temporary restraining order on August 29, 1957. On August 30, 1957, upon application of respondents, the District Court enjoined Mrs. Thomason from further proceeding in the state court litigation. 2 Race Relations Law Reporter 936 (1957). Mrs. Thomason appealed this decision which was affirmed by the Eighth Circuit. —— F. 2d —— (No. 15,915, C. A. 8th decided April 28, 1958).

Desegregation under the plan was to start at the high school level with the 1957-58 school year which commenced on September 3, 1957. After an elaborate "screening process," the Superintendent arranged to enroll nine Negro students in the formerly all-white Central High School (Tr. 354-355).[1] On the night of September 2, however, the Governor of the State of Arkansas announced that he would call out units of the Arkansas National Guard to preserve public peace and tranquility by keeping Negro students away from the white school. Respondents, upon learning of the action, applied to the District Court on the morning of September 3, 1957 for instruction. As a result of that application, the District Court entered an order on the same day directing the Board to put its plan for

[1] Tr. references are to the typewritten copy of the transcript of the testimony on hearing of respondents' petition below.

integration into operation "forthwith." 2 Race Relations Law Reporter 938 (1957).

On September 4, the nine Negro students attempted to enter the school but were turned away by the Arkansas National Guardsmen. On September 5, respondents filed a petition for a temporary suspension of the operation of the plan which the District Court denied. 2 Race Relations Law Reporter 941 (1957).

On September 9, 1957, the District Court entered an order inviting the United States Government to enter the case as amicus curiae and to commence injunction proceedings against the Governor of the State of Arkansas and his subordinates for the purpose of preventing their interference with and obstruction of the orders of the District Court directing the respondents to carry out their integration plan. 2 Race Relations Law Reporter 941 (1957).

The government intervened and after a hearing held on September 20, 1957, a preliminary injunction was entered restraining the Governor, the Adjutant General of the State of Arkansas and the Unit Commander of the Guardsmen on duty from interfering, inter alia, with the orders of the District Court. *Aaron* v. *Cooper,* 156 F. Supp. 220 (E. D. Ark. 1957). The Governor obeyed the order, but prosecuted an appeal therefrom. It was affirmed by the Eighth Circuit. *Faubus, et al.,* v. *United States, et al.,* —— F. 2d —— (No. 15904 C. A. 8 decided April 28, 1958).

On Monday, September 23, 1957, the Negro students entered Central High School under the protection of the Police Department of the City of Little Rock. However, they were removed by the respondent superintendent after a large crowd gathered around Central High School (Tr. 264).

A short time thereafter, the Negro students were returned to the school under the protection of Federal troops, which were ordered to Little Rock by the President of the United States, where they remained until school closed on May 28, 1958 (Tr. 264, 267).

After the Federal troops were stationed at the Central High School, the crowd outside of the school, which led to the removal of the Negro students, was dispersed and remained so dispersed until the end of the school term (Tr. 264). During the school year, one Negro student was expelled and one Negro student graduated (Tr. 313-314, 322).

On February 20, 1958 respondents filed in the District Court a petition in this cause. Federal jurisdiction had originally been invoked by petitioners in this case pursuant to the provisions of Title 28, United States Code, Section 1343(3). In filing their petition, respondents relied upon the provisions of Rule 60(b) of the Federal Rules of Civil Procedure. In their petition, respondents prayed that "the plan of integration heretofore ordered by this Court be realistically reconsidered in the light of existing conditions and that in the interest of all pupils the beginning date of integration be postponed until such time as the concept of 'all deliberate speed' can be clearly defined and effective legal procedures can be obtained which will enable the District to integrate without impairment of the quality of education it is capable of providing under normal conditions."

On February 25, 1958, petitioners filed a motion to dismiss the petition on the ground that it failed to state a claim upon which relief could be granted and on the ground that it failed to state a claim for relief from a judgment or order cognizable under Rule 60(b).

On April 18, 1958, the Honorable Archibald K. Gardner, Chief Judge of the United States Court of Appeals for the

Eighth Circuit, designated the Honorable Harry J. Lemley, United States District Judge to hear and determine the petition since there was no other judge regularly commissioned in the Eastern District of Arkansas and since there was great public interest in the respondents' petition (Appendix 29).

On April 28, Judge Lemley held a preliminary hearing during the course of which he read a prepared statement which, inter alia, directed that the original petition be amended in order to disclose whether the Board desired time to reconsider the plan or whether it simply desired a "moratorium" or a "cooling off period" and to indicate a definite time during which the postponement was desired (Appendix 29).

Thereafter, the Board filed a substituted petition in which it prayed for a suspension of its plan until January 1961.

Petitioners filed a response to the substituted petition in which they again moved to dismiss on the ground that respondents were not entitled to the relief sought, and on the ground that the Negro children admitted in September 1957 had a vested right to remain in the school.

On June 3, 1957, Judge Lemley commenced the hearing on respondents' substituted petition which was then amended without objection from petitioners. In their amended petition, they alleged, in essence, that because of repeated daily incidents within the school, caused by anti-integration agitation outside the school, the educational program at Central High School had been so impaired that the Negro and white children had both suffered, and would continue to suffer, unless the requested delay was granted.

Testimony introduced by respondents upon the hearing was designed to show that during the school year 1957-1958 the following occurred:

1. There were a large number of disciplinary problems involving pupils in the school. Although there were no incidents in the classrooms, there were a number of incidents in the halls and in the cafeteria. These incidents consisted mainly of "slugging, pushing, tripping, catcalls, abusive language, destruction of lockers," all directed against the nine Negro students (Tr. 13, 22, 40-41, 50, 53-55, 61, 92, 351).

2. Tension among students and teachers resulting from the presence of the nine Negro students (Tr. 13, 79, 89, 123, 143).

3. Bomb threats, 43 in number, necessitated numerous searches of the school building to determine whether there were, in fact, any bombs in the school. In connection with these bomb threats, most of which were broadcast on the local radio and television, there were numerous calls from parents and withdrawal of students for the day (Tr. 17-19, 45, 105).

4. Destruction of school property via acts of vandalism and mischief throughout the school necessitated the expenditure of funds, which might otherwise have been used for painting and to repair damage (Tr. 101-119).

5. Misconduct on the part of some students resulted in approximately 200 suspensions for short periods of time and two permanent expulsions (Tr. 326).

6. In some classes, the amount of work generally covered in previous years was not covered and in one instance the teacher requested that the achievement examination not be given this year (Tr. 124, 136, 207).

7. The administrative staff in the school was required to spend a great deal of time making reports of alleged incidents arising out of the presence of the nine Negro students and removing photographers and other unauthorized persons from the school premises (Tr. 48-50).

8. Social clubs, some of the in-service training programs, and some of the extra-curricular school activities received less attention than in the preceding school years (Tr. 12, 37, 150, 284).

With the exception of the vice-principal for boys, the other teachers and administrative staff who testified for the respondents believe that the presence of the nine Negro children in Central High School in September 1958 would result in a continuance of the preceding incidents, thus preventing respondents from giving the white children in Central High "quality education" (Tr, 17, 72-73, 125, 162, 273-274).

Petitioners moved to strike the testimony of all of respondents' witnesses on the ground that the testimony was irrelevant and immaterial to the issues in this case (Tr. 21). None of the testimony was stricken. At the end of respondents' case, petitioners renewed their motion to dismiss. Decision was reserved until final consideration by the court (Tr. 361).

Petitioners offered the testimony of two expert witnesses, both of whom are experts in school administration, who testified, in essence, that if stronger disciplinary measures had been instituted by the school authorities during the 1957-1958 school year, the incidents occurring within the school, which are enumerated above, would have been minimized and that if such stronger disciplinary measures are instituted in September 1958, the Negro children could

continue in the school without impairment of the educational process, as claimed by respondents (Tr. 372, 379, 444-446).

Respondents claim that their determination that the integration plan should be suspended for a period of two and one-half years was based upon the fact that (1) Governor Orval Faubus probably would not be Governor of Arkansas in 1961, (2) the constitutionality of the anti-integration laws enacted by the Arkansas Legislature in 1957 probably shall have been determined by the courts and the attitude of state officials which is now one of total opposition may have changed and (3) the educational standards have been lowered (Tr. 191-195, 268-269, 273).

Respondents concede that community opposition to desegregation is the sole basis for their application for suspension of the plan (Tr. 74, 94-95, 244, 246-254, 286, 330, 339-340).

On June 21, 1958, Judge Lemley entered an order modifying the prior orders of the District Court which had been entered in this case ordering respondents to proceed with their plan of gradual desegregation so as to permit a suspension of the operating of that plan until mid-semester of the 1960-1961 school year without the respondents being considered, either collectively or individually, in contempt of court.

On June 21, petitioners filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit from said order and applied to the Honorable Harry J. Lemley for a stay of his order pending such appeal. The application for a stay was denied on June 23, 1958 (App. 62). On June 24, 1958, petitioners applied to the United States Court of Appeals for the Eighth Circuit for a stay of Judge Lemley's order pending appeal and on the same

date petitioner's appeal was docketed in the United States Court of Appeals for the Eighth Circuit.

Reasons for Granting the Writ

1. The Decision Below Conflicts With Applicable Decisions of This Court.

The decision of the court below is directly in conflict with the decision of this Court in *Brown* v. *Board of Education*, 349 U. S. 294. In the instant case the respondent school board sought and the court granted an order suspending a previous order approving a plan of desegregation of the public schools of Little Rock. The sole purpose of the suspension was to obtain a "cooling off period" for those in disagreement with the decision of this Court in *Brown*. While purporting to follow the decisions of this Court the court below ruled that *Brown* did not cover opposition *after* a desegregation plan had been approved and was in operation.

As early as *Buchanan* v. *Warley*, 245 U. S. 60, 73, this court held that the constitutional rights of a minority might not be denied "to promote the public peace by preventing racial conflicts;" and see *Monk* v. *City of Birmingham*, 185 F. 2d 859 (C. A. 5th 1950) cert. denied 341 U. S. 940. To the same effect are *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579; *Ex parte Endo*, 323 U. S. 283 and *Morgan* v. *Virginia*, 328 U. S. 373. In the identical tradition, the School Segregation Cases held that ". . . it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U. S. at p. 300.

Heretofore in passing on questions of school segregation this fundamental requisite of orderly democratic consti-

tutional government has been uniformly adhered to by the federal courts. In *Allen* v. *County School Board of Prince Edward County*, 249 F. 2d 462, 465 (C. A. 4, 1957) cert. den. 2 L. ed. 2d 530, the Court of Appeals held, *per curiam*, that "a person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights." At p. 465. And see *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (C. A. 5, 1957), cert. den. 354 U. S. 921; *Jackson* v. *Rawdon*, 235 F. 2d 93 (C. A. 5, 1956), cert. den. 352 U. S. 925; *Mitchell* v. *Pollock*, D. C., Ky., 1 Race Rel. L. Rep. 1038; *School Board of Charlottesville, Va.* v. *Allen*, 240 F. 2d 59 (C. A. 4, 1956), cert. den. 353 U. S. 910; and *School Board of Newport News, Va.* v. *Atkins*, 246 F. 2d 325 (C. A. 4, 1957), cert. den. 355 U. S. 855.

In sharp contrast the decision below cites the position of respondent board as follows:

> It is the theory of the Board, reflected in its pleadings, evidence and briefs, that the plan of integration which it adopted in 1955, upon the assumption that it would be acceptable and workable, has broken down under the pressure of public opposition, which opposition has manifested itself in a number of ways hereinafter mentioned, and that as a result the educational program at Central High School has been seriously impaired, that there will be no change in conditions between now and the time that school opens again in September, 1958, and that if the prayer for relief is not granted the situation with which the board will be confronted in September will be as bad as, if not worse than the one under which it has labored during the past school year, and that it is in the public interest that the requested delay be granted (App. 31).

And it embraces this position in the following terms:

> It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school, nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided.
>
> * * * * *
>
> When the interests involved here are balanced, it is our opinion, in view of the situation that has prevailed and will in the foreseeable future continue to prevail at Central High School under existing conditions, the personal and immediate interests of the Negro students affected, must yield temporarily to the larger interests of both races (App. 51).

Such a rule of law could be interpreted only as a concession that, while threats of violence are not grounds for denying constitutional rights, actual violence and its concomitant consequences are grounds for denying basic free-

doms. Such a position is but an invitation to violence and to substituting a government of mob for one of laws.

Not only did the court below void the constitutional right of plaintiffs to desegregated public school education, but it also negated the concomitant constitutional duty of the school board to effectuate such desegregation under Article 6, clauses 2 and 3:

> Relative to interference from outside the school, the plaintiffs urge that the Board should have either instituted criminal prosecution against the persons responsible, or that it should have applied for injunctive relief, as was done in the Hoxie, Arkansas, and Clinton, Tennessee, cases. See Hoxie School District No. 46 of Lawrence County v. Brewer, D. C., Ark., 137 F. Supp. 364, aff'd, 8 Cir., 238 F. 2d 91; and Kasper v. Brittain, 6 Cir., 245 F. 2d 92, cert. den., 2 L. ed. 2d 46. In answer to that argument Mr. Blossom testified, and he was corroborated by Mr. Upton, that the Board had determined as a matter of judgment not to resort to criminal prosecutions or to seek injunctive relief; that it was not the function of the Board to prosecute people or to seek injunctions but to run a school system, and that it had already had all of the litigation that it wanted and was not anxious for any more.
>
> We think that the Board acted within its competency in coming to that conclusion, and we do not think that its failure to commence criminal actions or to seek injunctive relief should militate against its present petition. In the first place, the Board is not charged with the duty of commencing criminal prosecutions or of enforcing the criminal laws of the State. Secondly, by reason of the nature, source and extent of the opposition to integration in Little Rock, actions by the Board looking toward criminal prosecutions or injunc-

tions might have aggravated rather than eased the situation. Moreover, the Board might have had a good deal of difficulty in identifying the persons causing the trouble or in establishing that their conduct constituted crimes or was of such quality as would justify the granting of injunctive relief.

As far as the Hoxie and Clinton cases are concerned, Mr. Blossom testified, and we agree, that the situation at neither of those places was comparable to the situation that has existed and now exists in Little Rock. Both Hoxie and Clinton are much smaller places than Little Rock; hence the procedures followed in the former places might not be effective in the latter.

2. This Case Is One of Such Imperative Public Importance as to Justify the Deviation From Normal Appellate Processes and to Require Immediate Settlement in This Court.

The public interest in this case transcends the interest of any of the parties to this litigation. The order which is sought to be reviewed provides for the suspension of a school desegregation plan in effect for an entire school year after it had been approved by a Court of Appeals. Desegregation is now in effect in 764 out of 2,889 school districts in the seventeen southern states and the District of Columbia. (Southern School News, Vol. IV. No. 12, p. 1, June, 1958). There have been some 150 court cases with segregation-desegregation questions since May 17, 1954. Many are still pending[2] (Southern School News, Vol. IV. No. 8, p. 1,

[2] Typical of pending cases in which public opposition to desegregation is alleged are: *Rippy* v. *Borders*, 250 F. 2d 690 (C. A. 5th 1957); *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (C. A. 5th 1957), cert. den. 354 U. S. 921; *County School Board of Arlington County, Va.* v. *Thompson*, 252 F. 2d 929 (C. A. 4th 1958), cert. den. 2 L. ed. 2d 1065; *School Board of City of Newport News, Va.* v. *Atkins*, 246 F. 2d 325 (C. A. 4th 1957), cert. den. 354 U. S.

February, 1958). The order here involved will certainly create instability in these areas as well as others now considering desegregation with or without a court case. To follow normal appellate processes will mean that the case could not be decided by this Court prior to the next school term.

The substance of the District Judge's ruling is that public disagreement with this Court's decision in *Brown* when accompanied by overt acts is sufficient grounds for suspending desegregation already in process. Judge Lemley's Memorandum Opinion states:

> Before discussing further the adverse effect of the events that transpired during the past school year, we desire to point out that the Board and the school administration had no authority over individuals or groups outside the school, and while they undertook to handle and control the situation within the school by the employment of normal disciplinary procedures, they were unable to do so because of the nature and source of the opposition to integration both inside and outside the school.
>
> It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals

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921; *School Board of City of Charlottesville, Va.* v. *Allen*, 240 F. 2d 59 (C. A. 4th 1956); *County School Board of Prince Edward County, Va.* v. *Allen*, 249 F. 2d 462 (C. A. 4th 1957), cert. den. 2 L. ed. 530.

the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided.

In this connection, the president of the Board, Mr. Upton, testified that between the spring and fall of 1957 there was a marked change in public attitude towards the plan, that persons who had formerly been willing to accept it had changed their minds and had come to the conclusion 'that the local School Board had not done all it could do to prevent integration, and that we didn't have to have integration'; and Vice-principal Powell testified that he believed that the white children involved in the incidents 'feel that they are morally correct in their attitude and in their opposition,' and that such is due to the 'cultural patterns and sociological patterns in this community for many years,' and that the students who created the incidents felt that it was wrong to integrate the Negro children into Central High School (App. 37-38).

An order supported by such reasoning can only result in: (1) encouragement to lawless elements opposing compliance with the *Brown* decision; (2) frustration to those seeking compliance in a lawful manner; and (3) confusion throughout the nation as to the true import of this Court's decision in *Brown*. At a time when many school boards are reexamining their plans for integration and others are considering

plans to go into effect this school term there is certainly an urgent need for final review of this order by this Court at the earliest possible time.

On the question of the rights of the plaintiffs the lower court decided:

> In the instant case it is not denied that under the Brown decisions the Negro students in the Little Rock District have a constitutional right not to be excluded from any of the public schools on account of race; but the Board has convincingly shown that the time for the enjoyment of that right has not yet come. That showing applies to the Negro students who were in the school last year as well as to others. While the plaintiffs contend that the rights of the students last mentioned have become vested, no authority in support of that proposition has been cited to us, and we know of no such authority, and we do not believe that such contention can be sustained (App. 57).

As to the duty of the defendant school board the lower court decided:

> Relative to interference from outside the school, the plaintiffs urge that the Board should have either instituted criminal prosecution against the persons responsible, or that it should have applied for injunctive relief, as was done in the Hoxie, Arkansas, and Clinton, Tennessee, cases. See Hoxie School District No. 46 of Lawrence County v. Brewer, DC, Ark., 137 F. Supp. 364, aff'd., 8 Cir., 238 F. 2d 91; and Kasper v. Brittain, 6 Cir., 245 F. 2d 92, cert. den., 2 L. Ed. 2d 46. In answer to that argument Mr. Blossom testified, and he was corroborated by Mr. Upton, that the Board had determined as a matter of judgment not to resort to criminal prosecutions or to seek injunctive relief; that

it was not the function of the Board to prosecute people or to seek injunctions but to run a school system, and that it had already had all of the litigation that it wanted and was not anxious for any more.

We think that the Board acted within its competency in coming to that conclusion, and we do not think that its failure to commence criminal actions or to seek injunctive relief should militate against its present petition. In the first place, the Board is not charged with the duty of commencing criminal prosecutions or of enforcing the criminal laws of the State. Secondly, by reason of the nature, source and extent of the opposition to integration in Little Rock, actions by the Board looking toward criminal prosecutions or injunctions might have aggravated rather than eased the situation. Moreover, the Board might have had a good deal of difficulty in identifying the persons causing the trouble or in establishing that their conduct constituted crimes or was of such quality as would justify the granting of injunctive relief (App. 59-60).

This case presents one of those crucial issues of national and international magnitude such as *United States* v. *Bankers Trust Co.*, 294 U. S. 240, the Gold Clause Cases in which the status of the national economy was in grave uncertainty, *United States* v. *United Mine Workers*, 330 U. S. 258, in which labor management relations and the authority of the federal judiciary were seriously beset by doubt, *Ex Parte Quirin*, 317 U. S. 1, 19, in which the petition raised questions "of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberties," *Girard* v. *Wilson*, 354 U. S. 524, in which the status of American Armed Forces overseas was seriously beclouded, and other decisions of this Court cited under

"Jurisdiction," *supra*. We respectfully submit that the wide-spread probable consequences of this decision on present and planned desegregation, whether via court action or not, and its significance for civil rights generally, is such as to call for a speedy resolution by this Court.

CONCLUSION

WHEREFORE, it is respectfully submitted that the decision is so clearly wrong and that the public interest in its early disposition so great that this Court should:

1. Advance the date on which respondents are required to file their brief in opposition.

2. Grant the writ of certiorari before judgment by the Court of Appeals.

3. Either extend the present term of Court or order a special term of Court to be convened pursuant to Rule 3 to hear arguments and dispose of the case.

4. Reverse the judgment.

Respectfully submitted,

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APPENDIX

Order

IN THE

DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

Civil Action No. 3113

JOHN AARON, *et al.*,

Plaintiffs,

—v.—

WILLIAM G. COOPER *et al.*, Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,

Defendants.

On this day the Court having considered the petition of the defendants in the above styled cause wherein they pray for a modification of the orders of this Court, entered on August 28, 1956, and September 3, 1957, respectively, so as to permit a temporary suspension of the defendants' plan for the gradual racial integration of the public schools in Little Rock, Arkansas, and being well and fully advised, and having filed herein its memorandum opinion in connection with said petition, incorporating therein its findings of fact and conclusions of law,

IT IS BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendants be, and they hereby are, granted

permission to suspend the operation of said plan of integration until mid-semester of the 1960-61 school year without being considered, either collectively or individually, in contempt of this Court.

The Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

This the 20 day of June, 1958.

HARRY J. LEMLEY
United States District Judge

Memorandum Opinion

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

Civil Action No. 3113

JOHN AARON, *et al.*,

Plaintiffs,

—v.—

WILLIAM G. COOPER, *et al.*, Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,

Defendants.

This cause is now before the Court upon the petition of the defendants, members of the School Board of Little Rock, Arkansas, and the Superintendent of Schools, for an order permitting them to suspend until January, 1961, the operation of the plan of gradual racial integration in the Little Rock public schools, which plan was adopted by the Board in 1955, and was approved by the Court in 1956, the Court of Appeals affirming. Aaron v. Cooper, D. C., Ark., 143 F. Supp. 855, aff'd, 8 Cir., 243 F. 2d 361. This petition has been tried to the Court and the Court having considered the pleadings, briefs and evidence, and being well and fully advised, doth file this memorandum opinion, incorporating herein its findings of fact and conclusions of law.

In order that the issues tendered by the Board's petition may be intelligently understood, a brief history of this litigation is desirable:

Prior to the decisions of the Supreme Court of the United States in the Brown cases (Brown v. Board of Education, 347 U. S. 483, and 349 U. S. 294) the public school system in Little Rock, like all other public school systems in the State of Arkansas, was operated on a racially segregated basis. A few days after the first Brown decision was rendered the Board announced that it was commencing studies looking toward the establishment of an integrated school system; and in 1955, a few days prior to the rendition of the second Brown decision, the Board announced a plan of gradual integration extending over a period of years, the plan to go into operation with respect to the high school grades at the commencement of the 1957-58 school year.[1]

Thereafter, the plaintiffs in this case, who are Negro children of school age residing within the Little Rock School District, commenced a class action against the members of the Board and the Superintendent of Schools attacking the plan. The case was tried by Judge John E. Miller of Ft. Smith, who was sitting in the Eastern District of Arkansas under a special assignment. As indicated, the plan was approved, and the Court dismissed the prayer of the complaint for declaratory and injunctive relief, and retained jurisdiction of the case for the purpose of entering such other and further orders as might be necessary to obtain the plan's effectuation.[2]

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[1] The plan is set out verbatim and thoroughly discussed in the district court's opinion in Aaron v. Cooper, supra.

[2] In the very recent case of Thomason v. Cooper, et al., 8 Cir., —— F. 2d ——, a phase of this litigation, as will hereinafter appear, the Court of Appeals in construing Judge Miller's decree, said that in effect it ordered the Board to put the plan into operation at the beginning of the 1957-58 school year.

At the time the plan was adopted, the Board recognized that the vast majority of the people of Little Rock was opposed to integration, but it was felt by the Board that the plan would be acceptable as the best one obtainable under the circumstances, and that it would be workable if put into operation in September, 1957. As time went on, however, opposition to integration increased in intensity not only in Little Rock but throughout the State as a whole, as is shown by the fact that in the general election in November, 1956, the people of the State by substantial majorities adopted: (a) Amendment No. 44 to the Arkansas Constitution of 1874, which amendment directed the Arkansas Legislature to take appropriate action and pass laws opposing "in every Constitutional manner" the decisions of the Supreme Court in the Brown cases; (b) A resolution of interposition which, among other things, called upon the people of the United States and the governments of all of the separate states to join the people of Arkansas in securing the adoption of an amendment to the Constitution of the United States, which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to include a prohibition to any state to provide for the maintenance of racially separate but substantially equal public schools within such state; (c) A pupil assignment law dealing with the assignment of individual pupils to individual public schools.

And the 61st General Assembly, which met in January, 1957, passed four statutes, one of which established a State Sovereignty Commission; another of which relieved school children of compulsory attendance in racially mixed public schools; the third of which required certain persons and organizations engaged in certain activities, including those

affecting integration, to register with and make periodic reports to the State Sovereignty Commission; and the fourth of which authorized local school boards to expend district funds in employing counsel to assist them in the solution of problems arising out of integration.

In August, 1957, Mrs. Clyde Thomason, a white person, filed a suit against the Board and the Superintendent in the Chancery Court of Pulaski County, the purpose of which suit was to enjoin them from putting the plan into operation; that suit was based, in part at least, upon the legislation heretofore mentioned. A hearing was held before the Chancellor, and on August 29, 1957, a temporary restraining order was issued. At that time Judge Ronald N. Davies of Fargo, North Dakota, was sitting in the Eastern District of Arkansas under special assignment, and on August 30, upon the application of the Board in this cause, he enjoined further proceedings by the plaintiff in the state court litigation. His decision was appealed, and he was affirmed. Thomason v. Cooper, supra.

The 1957-58 school year was due to commence on September 3, 1957, and the Board had arranged to enroll nine Negro students in the formerly all-white Central High School pursuant to the plan. On the night of September 2, however, the Governor of the State of Arkansas announced that in the interest of preserving the public peace and tranquility he had called out units of the Arkansas National Guard and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The Board, learning of the Governor's action, requested the nine Negro students not to attempt to enter the school the following day, and on the morning of September 3 the Board applied to Judge Davies for instructions. As a result of that ap-

plication Judge Davies entered an order on the same day directing the Board to put its plan of integration into operation "forthwith."

On September 4 the Negro students attempted to enter the school but were turned away by the national guardsmen. The next day the Board filed a petition for a temporary suspension of the operation of the plan, which petition upon a hearing by Judge Davies was denied.

On September 9, 1957, Judge Davies entered an order inviting the Government to come into the case as amicus curiae and to commence injunction proceedings against the Governor and his subordinates "to prevent the existing interferences with and obstructions to the carrying out of the orders heretofore entered by this Court in this case." Thereupon the Government intervened, and after a hearing held on September 20, a preliminary injunction was entered restraining the Governor, the Adjutant General of the State of Arkansas, and the Unit Commander of the guardsmen on duty from "(a) obstructing or preventing, by means of the Arkansas National Guard, or otherwise, Negro students eligible under said plan of school integration to attend the Little Rock Central High School, from attending said school or (b) from threatening or coercing said students not to attend said school or (c) from obstructing or interfering in any way with the carrying out and effectuation of this Court's orders of August 28, 1956 and September 3, 1957, in this case, or (d) from otherwise obstructing or interfering with the constitutional right of said Negro children to attend said school." See Aaron v. Cooper, D. C., Ark., 156 F. Supp. 220.

The Governor obeyed the order entering the temporary injunction just mentioned, while at the same time prosecuting an appeal therefrom and withdrew the national guards-

men. Judge Davies' decision in question was affirmed by the Court of Appeals on April 28 of the current year. Faubus et al. v. United States et al., 8 Cir., —— F. 2d ——. On Monday, September 23, the Negro students entered Central High School under the protection of the police department of the City of Little Rock and of certain members of the Arkansas State Police. A large and demonstrating crowd, however, had gathered around Central High School, which crowd the officers on duty could hardly control, and they advised the Superintendent to remove the Negro children from the school which was done.

A short time later the Negro students were readmitted to the school under the protection of combat troops of the regular United States Army which the President sent into Little Rock for that purpose, and eight of these students remained enrolled for the balance of the school year which closed on May 28, 1958. During the entire school year the grounds and interior of Central High School were patrolled first by regular army troops and later by federalized national guardsmen.

The petition for a stay with which we are concerned was originally filed by the Board on February 20, 1958; that pleading, reduced to essentials, alleged that federalized national guardsmen were on duty at the school and were preventing interference with the attendance of the Negro students, that a small group of students with the encouragement of certain adults had created almost daily incidents making it difficult for pupils to learn and teachers to teach, that there existed unrest among students, parents and teachers which likewise made it difficult for the school district to maintain a satisfactory educational program, and that educational standards were being impaired. The prayer of the original petition was that "the plan of inte-

gration heretofore ordered by this Court be realistically reconsidered in the light of existing conditions and that in the interest of all pupils the beginning date of integration be postponed until such time as the concept of 'all deliberate speed' can be clearly defined and effective legal procedures can be obtained which will enable the District to integrate without impairment of the quality of education it is capable of providing under normal conditions." On February 25, 1958, the plaintiffs filed a motion to dismiss the petition on the ground that it stated no claim upon which relief could be granted, and on the further ground that it stated no claim for relief from a judgment or order cognizable under Rule 60(b) of the Federal Rules of Civil Procedure.

Although this case had never been on our docket, due to the fact that at the time there was no other judge regularly commissioned in the Eastern District of Arkansas, and in view of the public interest involved in the Board's petition, the Honorable Archibald K. Gardner, Chief Judge of the Court of Appeals for this Circuit, on April 18, 1958, designated us to hear and determine the issues presented by the petition, "and to do such work as may be necessary and incidental to acting upon said petition." This special assignment was made to run from April 21, 1958, to September 1, 1958, both dates inclusive.

On April 28, 1958, we held a preliminary proceeding in this matter, in the course of which we read a prepared statement, which, among other things, directed that the original petition be amended so as to disclose whether the Board desired time to reconsider the plan, or whether it simply wanted a "moratorium" or a "cooling off period," and also so as to give a reasonable indication of how long a postponement the Board felt that it needed at this time.

Subsequently, the Board filed a substituted petition containing allegations more or less similar to those of its original pleading, and praying that a stay be granted until January, 1961. In that connection, it was alleged: "Petitioners cannot with certainty determine how long operations under the plan should be postponed, but in the light of existing conditions hereinabove mentioned and in the light of conditions as they will probably exist in the foreseeable future, they are of the opinion that a suspension of operations under the plan until January, 1961 is reasonable and advisable."

The plaintiffs filed a response to the substituted petition wherein they renewed their motion to dismiss, on which motion ruling had been reserved at the preliminary proceeding above referred to, and in which they denied that the Board is entitled to the relief sought. In addition, on behalf of the Negro students admitted to the school in September, 1957, it was alleged that their rights to finish their high school education in Central High School have become vested, and that "defendants are without right at law or equity to frustrate said vested rights in this or any other proceeding."

When this matter was called for trial on the morning of June 3, the Board, without objection on the part of the plaintiffs, filed an amendment to the substituted petition alleging more definitely the respects in which it contends that the educational program at Central High School has been impaired due to the alleged situation at Little Rock. It is said in the amendment that the educational program has suffered and will continue to suffer; that the Board has had to divert funds in an attempt to solve the problems with which it has been faced, which funds would otherwise have been used for normal educational purposes such

as teachers' salaries, plant maintenance and new construction; that under the conditions that existed at Central High School during the school year just past, and under the conditions likely to exist in the foreseeable future, both the Negro and the white students have suffered and will continue to suffer unless the requested delay is granted; and that the problems caused by operation under the court orders that have been mentioned have taken and will continue to take "an undue amount of time, talent and energy of school personnel, all of which has been and will continue to be a severe strain on said personnel, and which has prevented and will continue to prevent said personnel from performing many of their regular duties."

While the plaintiffs have not filed any formal pleading directed at the amendment to the substituted petition, we shall treat the amendment as traversed, and will also consider that the plaintiffs' motion to dismiss extends to the same, as well as to the other pleadings filed by the Board.

It is the theory of the Board, reflected in its pleadings, evidence and briefs, that the plan of integration which it adopted in 1955, upon the assumption that it would be acceptable and workable, has broken down under the pressure of public opposition, which opposition has manifested itself in a number of ways hereinafter mentioned, and that as a result the educational program at Central High School has been seriously impaired, that there will be no change in conditions between now and the time that school opens again in September, 1958, and that if the prayer for relief is not granted the situation with which the Board will be confronted in September will be as bad as, if not worse than the one under which it has labored during the past school year, and that it is in the public interest that the requested delay be granted.

While the plaintiffs deny, at least formally, that the educational standards at Central High School have been impaired, it seems to us that their fundamental position is, that even if it be assumed that everything that the Board alleges is true from a factual standpoint, nevertheless the Board's difficulties stem entirely from popular disagreement with the principle of integration, which disagreement does not form a proper legal basis for permitting the Board to postpone the operation of its plan. This contention is summarized in the plaintiffs' pre-trial brief in the following language: "The defendants' case for suspension of the injunctions is predicated upon problems allegedly created by community oppositions to continued nonsegregation at Central High School. Such an approach is without legal foundation."

In addition, the plaintiffs contend that the Board does not actually stand in need of any relief. As touching the situation inside the school, they urge that the Board could have solved its problems during the year just past had it taken a firmer disciplinary stand, and that if such a stand is taken this fall the problems can still be solved; and they contend still further that if a stay should be granted it will be more difficult to put the plan back into effect in 1961 than it would be for the Board to persevere with it this coming year. With regard to the situation outside the school, the plaintiffs argue that the Board's proper remedy is the commencement of criminal proceedings or the seeking of injunctive relief against the persons responsible for the disorders.

Those conflicting theories present two basic questions for our decision, namely, whether or not this Court, sitting as a court of equity, has the power to grant the relief sought, and, if so, whether or not the Board has made a

showing sufficient to justify the granting of that relief. In that connection we might call attention to the fact that in the prepared statement that we read at the preliminary proceeding held on April 28 we took occasion to say, among other things: ". . . let me make it clear that if the Board makes a case for relief under the law and the evidence, then appropriate relief will be granted. But, on the other hand, if the Board fails to make a case, either from a legal or a factual standpoint, its petition will have to be denied."

As to the first question, there can be no doubt that this Court has "jurisdiction," in the sense of "power to act," to grant the relief sought. Such power is to be found in Rule 60(b) (5) and (6) authorizing a federal court to grant relief from a judgment when it is no longer equitable for the same to have prospective application, or for "any other reason justifying relief from the operation of the judgment"; and in their response to the substituted petition the plaintiffs admit: ". . . that Rule 60 (b)(5) and (6) empowers the Court to grant, upon such terms as are just, relief from a judgment or order."

Aside from Rule 60(b), jurisdiction to grant relief here may be predicated upon the inherent power of a court of equity with respect to its injunctive decrees. United States v. Swift & Co., 286 U. S. 106, 114-115; Tobin v. Little Rock Packing Co., D. C. Ark. 104 F. Supp. 527, aff'd, 8 Cir., 202 F. 2d 234, cert. den. 346 U. S. 832. And, more cogently, the existence of such jurisdiction in a case of this kind appears to have been specifically recognized in the second Brown opinion wherein it was said:

> "In fashioning *and effectuating* the decrees, the courts will be guided by equitable principles. Tradi-

tionally, equity has been characterized by a *practical flexibility* in shaping its remedies and *by a facility for adjusting and reconciling public and private needs.* These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make *a prompt and reasonable start* toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts *may find that additional time is necessary to carry out the ruling in an effective manner.* The burden rests upon the defendants to establish that such time *is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date . . .*" Brown v. Board of Education, supra, 349 U. S. at 300, emphasis supplied.

To hold that once a plan of integration has been approved and ordered into effect by a federal court, all of the details of that plan, including the commencing date and the rate

of progress toward complete elimination of compulsory segregation, become immutably fixed would negate the concept of equity's "practicable flexibility" in shaping its remedies, and would be an unwarranted limitation upon its "facility for adjusting and reconciling public and private needs." And it should be noted in this connection that although in the Arlington County, Virginia case the district judge ordered the Board there involved to commence integration by a certain time and to complete it by a certain time, he expressly reserved the power "to enlarge, reduce, or otherwise modify the provisions of said injunction or of this decree." Thompson et al. v. County School Board of Arlington County, Va., D. C., Va., 144 F. Supp. 239, 241, aff'd, 4 Cir., 240 F. 2d 59, cert. den., 353 U. S. 910.

As we approach the second question in this case, it should first be said that it cannot be seriously contended that the Board did not make a "prompt and reasonable start" toward a transition from a racially segregated to a racially integrated public school system. As stated, the Board announced its intention to move in that direction a very few days after the first Brown decision, and it actually announced its plan some days before the second and implementing decision in that litigation; and, in spite of the difficulties that have been outlined, it put the plan into operation and maintained it during the past school year. Hence the real problem is whether or not the Board now needs more time to make the transition "in an effective manner," and whether or not the granting of such time "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."

At the hearing on the petition, which extended from June 3 into the afternoon of June 5, the Board called to the stand its president, Mr. Wayne Upton, its Superin-

tendent of Schools, Mr. Virgil T. Blossom, certain members of the administrative staff of the high school, and certain class-room teachers. While the attorneys for the plaintiffs diligently cross-examined the main witnesses called by the Board, they did not put on any proof of their own tending to contradict the factual aspects of the testimony of the Board's witnesses, but confined their evidence to the testimony of two expert witnesses, namely, Dr. Virgil M. Rogers, Dean of the School of Education of Syracuse University, Syracuse, New York, and Dr. David G. Salten, Superintendent of Schools at Long Beach, Long Island, New York. Those witnesses gave it as their opinion in general that to grant the petition would be unnecessary and undesirable, and that the Board should keep its plan in operation while using stricter disciplinary procedures against those in the school who might become involved in racial incidents such as were described by the Board's witnesses; and they also were of the opinion that stricter procedures should have been used during the past school session.

From the practically undisputed testimony of the Board's witnesses we find that, although the continued attendance of the Negro students at Central High School was achieved throughout the 1957-58 school year by the physical presence of federal troops, including federalized national guardsmen, nevertheless on account of popular opposition to integration the year was marked by repeated incidents of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets and circulars designed to intensify opposition to integration.

Mr. J. O. Powell, the vice-principal for boys at the high school, summed the situation up by saying that the first year of operation under the plan was one of "chaos, bedlam and turmoil" from the beginning.

The incidents and other matters just referred to, plus the presence of the troops, which was in and of itself a distracting influence, created throughout the year a situation of tension and unrest among the school administrators, the class-room teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program; and we find that said program was seriously impaired, that the orderly administration of the school was practically disrupted, and that educational standards have suffered. We further find that unless a stay is granted, the same situation will prevail when school opens in September, and that the impairment of the educational program and standards will continue and will probably grow worse.

Before discussing further the adverse effect of the events that transpired during the past school year, we desire to point out that the Board and the school administration had no authority over individuals or groups outside the school, and while they undertook to handle and control the situation within the school by the employment of normal disciplinary procedures, they were unable to do so because of the nature and source of the opposition to integration both inside and outside the school.

It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent

desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided.

In this connection, the president of the Board, Mr. Upton, testified that between the spring and fall of 1957 there was a marked change in public attitude towards the plan, that persons who had formerly been willing to accept it had changed their minds and had come to the conclusion "that the local School Board had not done all it could do to prevent integration, and that we didn't have to have integration"; and Vice-principal Powell testified that he believed that the white children involved in the incidents "feel that they are morally correct in their attitude and in their opposition," and that such is due to the "cultural patterns and sociological patterns in this community for many years," and that the students who created the incidents felt that it was wrong to integrate the Negro children into Central High School.

With respect to the effects of the 1956 constitutional amendment and initiated acts and of the 1957 statutes. Mr. Blossom testified that, those enactments had their effect at Little Rock and throughout the State in stiffening

opposition to the plan and in persuading people that there was no necessity for integration at this time.

Mr. Blossom further testified that the opposition to integration and the feeling that it was not required at this time had been greatly strengthened by numerous newspaper articles and advertisements, and by circulars and cards distributed in Little Rock, copies of which were introduced in evidence. Without prolonging this opinion by undertaking to abstract or quote from individual exhibits, we may say that we agree with Mr. Blossom's appraisal of their effect. Those exhibits in general, condemn the principle of integration; some of them condemn the Board and the Superintendent for alleged precipitateness in adopting the plan, and for their alleged mistreatment of white students during the past year; and many of them emphasize the idea that integration can be avoided by legal, constitutional means.

Regardless of the merits of the sociological and legal views expressed in those exhibits, the conclusion is inescapable that they are shared, in whole or in part, by a majority of the population of Little Rock, representing a cross section of the people of that city. On that point, Mr. Upton was asked in the course of his examination whether or not the people who had raised with him the questions which we have previously mentioned were fairly intelligent people, and he replied that they were, and that they were generally people who recognized him and who knew him. And Mr. Blossom expressed the opinion that the doubts and questions in the minds of many people were honest ones, and that it was his opinion that the great majority of the people of the community, from the contacts he had had with it, do not favor integration.

With further reference to the 1956-57 enactments it should be said that at least some of them are now involved in litigation pending in the state courts and after that litigation is decided by the trial courts, appeals will doubtless be taken to the Supreme Court of Arkansas, which alone can finally and authoritatively construe the same, and can, in the first instance, pass upon their validity; after the Supreme Court of Arkansas has ruled, these matters may well be carried to the Supreme Court of the United States for final review, all of which will take time. On that subject Mr. Blossom testified:

> "If you take the suits that are now pending and recognize the ones that are now being proposed, and none of them have been cleared out, the opinion that I would have would be that there are many, many months ahead before there will be any decision on them, to where there is a clear-cut situation between state and federal law on this problem, and that, in itself, creates this dilemma. You don't know where you are."

Getting back to the effects of the events of the past school year on the educational program at Central High School, we find more specifically that those events have had a serious and adverse impact upon the students themselves, upon the class-room teachers, upon the administrative personnel of the school, and upon the overall school program. In addition, said events have cast a serious financial burden upon the school district, which it has had to meet at the expense of normal educational and maintenance functions.

As far as the students themselves are concerned, we think it obvious that the incidents and conditions that have

been described could not have been good for them emotionally; but aside from that, their education has certainly suffered and under existing conditions will continue to suffer, as is shown by the testimony of the class-room teachers called by the Board.

For example, Mr. W. P. Ivey, who has taught mathematics in the Little Rock school district for 34 years and who has been on the faculty of Central High School ever since that school was opened in 1927, testified that the presence of the Negro students created a tension on the part of both students and teachers that was noticeable every day, and that this tension impaired his ability to teach and the receptivity of his students. On cross-examination he stated that the final results obtained by him in his classes were not as good as they had been in prior years, as evidenced by his tests and also by comparison of the grades made in his classes which included Negro students with the grades made in his classes not attended by any of the Negroes.

Another member of the faculty who described the adverse effect that the presence of the Negro students, and all that went with it, had on educational standards was Mrs. Govie Griffin, who has taught chemistry for 13 terms at Central. The subject that she teaches is an elective course, taken principally by those who plan to go to college and who presumably are interested in mastering the subject. It was her observation that the presence of the troops in the school, their standing outside of class-room doors during recitations, and their actions in walking up and down the halls, occasionally dropping their clubs, all had a disturbing effect on pupils and teachers alike. Due to that situation and the prevailing tension and unrest, the amount of subject matter that she was able to offer in her chemistry course was so seriously curtailed that she had to request

that standard achievement tests usually given at the close of the school year be not given; and her request was granted. She said in this regard: "In the past we have always given standardized tests at the close of the school year, and the pupils have always been far above the national norm. This year I requested they not be given the test in all fairness to the students because we had not covered the material we had in the past years."

As to the effect of the events of the past session on the class-room teachers and administrative staff personally, the observations and experiences of Mrs. Elizabeth Huckaby, vice-principal for girls, who has been at Central since 1930, an informative. She stated that normally in addition to her administrative duties she taught two English classes, but that during the past year she has been compelled to give up those classes and to devote all of her time to administrative duties, and that from 75 to 90 percent of her time was devoted to problems created by integration. These problems, and the unrest and tension in the school had an adverse effect upon her nerves and physical well being. She testified that apprehension over existing conditions caused her to lose sleep, which problem she had never had before; that she had no social life because of her exhaustion at the end of each day, and that on week ends she and her husband would go to the country and relax, and that by noon on Sunday she "would begin to revive enough to face the next week." Mrs. Huckaby also observed that other teachers were likewise suffering ill effects; she stated that some would come to her trembling, and that others would come weeping because of the events that were transpiring, and she pointed out in this connection that teachers in the main are not accustomed to violence.

Mrs. Huckaby's testimony as to the effect of the integration problems on the class-room teachers was corroborated

by that of Mrs. Margaret Ryman, a mathematics teacher, and of Mrs. Shirley Stancil, a guidance counsellor, and likewise by the testimony of Mr. Blossom. The latter stated that one of his greatest concerns during the year was the health and welfare of the teachers, and that he felt very strongly that the teachers were under more strain than the students since they had upon their shoulders the responsibility for the physical welfare and educational progress of every student in the school, and that "they took that responsibility to heart and it affected many of them and that was reflected in many of the conferences I had with them as individuals."

The tension and strain to which the administrative staff were subjected did not terminate with the close of the school day. Mr. Powell stated that on a typically difficult day his phone would commence ringing as soon as he got home from school, the calls coming from people desiring various types of information; that he has spent as much as three hours on certain days "answering the telephone, or in making calls or dodging calls"; that he has had to work long hours during the evenings and nights on many occasions, and that his social life and normal rest had been interfered with to a definite extent during the entire school year.

Along the same lines Mr. O. W. Romine, Director of School Plant Services for the entire school district, testified that under normal conditions he worked from eight in the morning until five in the afternoon, and that after hours' duty was rare. During the past year, however, he had been on call 24 hours a day, and had received hundreds of calls at all hours of the night; on many occasions when his telephone had rung, and he had picked up the receiver, he found no one on the line. At one stage of the troubles

he was away from home so much at night that he did not see his youngest child for four days, since he would get in at night after the child had gone to bed and would be gone in the morning before the child awoke.

The subject matter of some of the exhibits introduced by the Board consisted, in part at least, of personal attacks on the Board members and the administrative staff, which could not have failed to have reacted unfavorably upon them personally. In addition, Mr. Blossom was the recipient of many threats against his physical safety and well being. Of the Board members, Mr. Upton, at least, was subjected to much personal harassment, mainly by telephone calls, and to such an extent that he had to take an unlisted number.

It is too clear to require discussion that the experiences of the classroom teachers and of the administrative staff must have produced at least some loss of personal efficiency on their part, with corresponding damage to the educational program. More serious, however, is the fact that it has been necessary to divert the time and talents of the trained administrative personnel from their normal duties in dealing with the many complex problems involved in the operation of a high school like Central to purely disciplinary matters; and we find, as alleged by the Board, that the efforts of the administrative staff to cope with the integration problems with which they have been confronted have consumed an undue amount of their time and energy; and we agree with Mr. Blossom in his statement that the diversion of administrative skills and energies to discipline maintenance during the past year may have been one of the highest prices that the school district has had to pay. At least one serious result of such diversion is that the curriculum planning which had been pre-

viously emphasized at Central, has been seriously impeded. In addition, the building program has been held up although the District's enrollment is rapidly increasing, with an accompanying need for more facilities.

As stated, the evidence further showed that the school district has had to shoulder substantial financial burdens on account of integration, and that this has been at the expense of other school programs. Mr. Romine testified, for example, that it was necessary to employ five additional night watchmen at the high school and that the cost for this item alone was between nine and ten thousand dollars; further, when it became necessary to relieve Mr. Powell and Mrs. Huckaby of their teaching duties so that they could devote their energies to the administrative problems with which the school was confronted, substitutes had to be hired to take their places in the classrooms. Moreover, the Board had to spend money to repair the damages to the school property, and to replace locks which had to be cut off of lockers during bomb searches; on that point Mr. Romine said that at one time he saw a bushel basket full of cut locks, and that it cost the Board $1.25 apiece to replace them. Mr. Romine further testified that the overall maintenance budget for all the schools in the district for the fiscal year ending June 30 of the current year was $123,000, that by January of this year he saw that unless something was done that budget would be overrun by approximately $17,000. In order to stay within the budget it was necessary he said to dismiss the paint crew of five men, thus saving not only their wages but also the cost of the paint they would have used, and to forego some normal maintenance work on the school properties.

Mr. Blossom testified that the funds of the Little Rock School District are not unlimited, that in fact the district

is underfinanced, and the annual expenditure per child is approximately $100 below the national average. He further pointed out that whenever district funds have to be diverted to meet unusual problems as they were during the past year, the district suffers harm, and that such diversions may mean that less teachers can be employed, and less instructional equipment purchased.

Looking toward the approaching school term it was the consensus of opinion on the part of the Board's witnesses, and we find, that there has been no softening of the public attitude in Little Rock toward integration, and we further find, as heretofore stated, that unless some relief is granted the Board the conditions that will prevail in Central High School during the 1958-59 school year will be as bad as they were during 1957-58, and will probably deteriorate still further. One reason for this conclusion is that, according to the evidence, Central High School operated last year largely on a momentum that had been built up during past years, and that momentum is running down. Any efficient organization, manned by skilled personnel, as was Central High School in September, 1957, can operate for a time on its momentum even in the face of severe pressure; but with such pressure a time comes when that momentum is lost, and when that happens then, unless the pressure is removed, the organization breaks down. We are convinced that such point is being approached at Central. Mr. Blossom stated in that connection that the strain of the past year had already taken its toll, and would be felt still further when school opens this fall, and that starting into another year would be entirely different from the commencing of school last September. In this he was corroborated by Mrs. Huckaby.

We further find that if the attendance of Negro students at Central High School is to be maintained during the next

school year, the Board will have to have military assistance or its equivalent, and it is financially unable to bear the expense of hiring a sufficient number of guards to control the situation. It cannot be expected that the Little Rock Police Department will be in a position to detail enough men to afford the necessary protection.

As to the need for troops when school re-convenes, Superintendent Blossom stated that he saw nothing to indicate that conditions at the school would be different in September than they were throughout the past year, and that as a school administrator he saw no lessening of responsibility for the safety of everyone concerned; he said, "We have that responsibility just as greatly today as we did yesterday, and we will have it tomorrow." And when asked whether or not it would be necessary to have the same guards and civilian security employees in the school in September, he replied: "As I said before, I have no reason to anticipate anything different from what we had. If we take what history teaches us, I think that will be a natural conclusion."

Now, while troops can disperse crowds, and can keep the Negro students physically within the school, and while it is possible that if troops were deployed in sufficient numbers all over the school vandalism could be checked, the presence of troops cannot reduce or eliminate racial tensions, or create a climate that is conducive to education; on the contrary, the presence of armed soldiers in a school is, as has been shown here, disrupting to the educational process. As to the importance of a proper educational climate, Mr. Blossom said: ". . . any educational program needs to have certain things present in the atmosphere, such as a climate where children can be taught and teachers can teach. We have contended that that condition has not

existed at Central High School, that it is not likely to exist next year. Now, in putting on any educational program, the proper conditions are about as necessary as the proper tools and the proper teachers." Furthermore, when Mrs. Huckaby was asked on cross-examination if she did not think that the Board, the school administration, the city authorities, and the military could carefully plan the running of the high school, she replied that she did not relish the idea of having those particular groups always involved in her educational system, because as an educator such was foreign to her experience.

As has been said, there can be no question that the Board made a prompt and reasonable start toward compliance with the principles laid down in the Brown cases; thereafter, it put its plan into operation and has adhered to it in good faith in the face of great difficulties. Now, it has come here seeking relief only after it has been confronted with what is, from an educational standpoint, an intolerable situation, and it does not ask for an abandonment of its plan nor does it attempt to obtain an indefinite postponement. It is simply requesting a tactical delay. We are convinced that in seeking this delay the Board is still acting in good faith, and, upon the showing that has been made, we are satisfied that the Board needs more time to carry out its plan in an "effective manner," and that to grant the instant petition is in the public interest, and is consistent with good faith compliance, at the earliest practicable date, with the principles above mentioned. In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles "cannot be allowed to yield simply because of disagreement with them"; here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is

more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted.

We have seen that the Supreme Court said in the second Brown decision that the transition of a formerly segregated school to a school free from compulsory segregation should be carried out in an "effective manner," and that such a transition is in the public interest. In our estimation a transition which impairs or disrupts educational programs and standards, and which will continue to do so, is not in the public interest, but, on the other hand, inflicts irreparable harm upon all of the students concerned, regardless of race. Where, as here, such a transition is being undertaken under the compulsive effects of a federal court order, a refusal to modify such order so as to ameliorate the situation would in our opinion under the circumstances here present be inequitable, if not arbitrary as well.

That the Supreme Court recognized the necessity of maintaining educational standards is evidenced by the following language in the first Brown decision.

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any

child may reasonably be expected to succeed in life if he is denied the opportunity of an education . . . " (Brown v. Board of Education, supra, 347 U. S. at 493).

And Judge Miller, in his original opinion in this case, pointed out that the Board was undertaking not only to work out a program of integration, but also to preserve and improve educational standards; and he took occasion to say: "(The Board) must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards must not be lowered . . . " (Aaron v. Cooper, supra, 143 F. Supp. at 864-865.) Furthermore, the Court of Appeals in its affirming opinion said: " . . . The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places." Aaron v. Cooper, supra, 243 F. 2d at 364.

The importance of maintaining educational standards today is certainly no less than it has been in prior years; in fact it is more urgent. And while the Negro students at Little Rock have a personal interest in being admitted to the public schools on a nondiscriminatory basis as soon as practicable, that interest is only one factor of the equation, and must be balanced against the public interest, including the interest of all students and potential students

in the district, in having a smoothly functioning educational system capable of furnishing the type of education that is necessary not only for successful living but also for the very survival of our nation and its institutions. There is also another public interest involved, namely, that of eliminating, or at least ameliorating, the unfortunate racial strife and tension which existed in Little Rock during the past year and still exists there.

When the interests involved here are balanced, it is our opinion, in view of the situation that has prevailed and will in the foreseeable future continue to prevail at Central High School under existing conditions, the personal and immediate interests of the Negro students affected, must yield temporarily to the larger interests of both races.

While we do not seek at this time to authoritatively define the term "all deliberate speed" employed by the Supreme Court in the Brown case, it does seem to us that the term is a relative one, dependent upon varying facts and circumstances in different localities and that what might be "deliberate speed" under one set of circumstances could constitute headlong haste under another. And it further appears to us that said term involves the idea of a progress toward the elimination of compulsory segregation that is consistent with the maintenance of sound educational standards and a salutary educational atmosphere, neither of which can be maintained at Central High School if the Board is compelled to keep its plan in operation at this time. After all, the function of any public school system, whether integrated or not, is to educate people.

It is important to realize that to grant the stay requested by the Board will not deprive any Negro student of a good high school education. In 1957 the completely new and up-to-date Horace Mann High School for Negroes was put

into operation, and in that school, apart from any question of integration, the Negro students can receive an education equal to that provided in Central High School. As to the Horace Mann School, Mr. Blossom testified that, relatively speaking, the quality of education in that school, measured by any desired indicia, whether facilities, teacher preparation, teaching aids, or instructional supplies, is "on a par with any other school." He further stated with reference to the past session: "The truth of the business is it was better than most high schools in this State, white or colored." He also testified that he felt that the Negro students could in 1958 "be better educated in another manner without them being hurt."

The granting of the Board's petition does not, in our estimation, constitute a yielding to unlawful force or violence, but is simply an exercise of our equitable discretion and good judgment so as to allow a breathing spell in Little Rock, while at the same time preserving educational standards at Central High School.

At one point in his testimony Mr. Blossom stated, and we agree with him, that a tactical delay is not the same as a surrender; and the delay here sought is not a vain thing or a mere frustration of the plaintiffs' rights. In the first place, the delay, in and of itself may well be of material value to the Board in carrying out its announced purposes. In the two and one-half year period involved tempers will have a chance to cool down, emotions may subside to some extent, and there may also be changes in some of the personalities involved in the dispute. Of more significance, however, is the fact that the delay will afford time for the completion of the pending litigation in the state courts and for an appraisal of the results of that litigation. Obviously, should the state legislation challenged in that litigation

be upheld as valid, such a result might well have a profound effect on the situation at Little Rock. On the other hand, should that legislation be held unconstitutional, and particularly if such a result should be reached by the state courts, the people of Little Rock might be much more willing to acquiesce in integration as contemplated by the plan.

What has just been said likewise indicates that the length of the proposed stay is reasonable, and we so find. On this point we agree with the opinion expressed by Mr. Upton, who is an experienced lawyer, that it will take at least two years for the litigation above referred to to be finally terminated. In addition to that, considering the nature of the problem, two and one-half years is not a very long period of time; and a very short delay would serve no useful purpose. Added to those considerations is the fact that the Board and the Superintendent, who are familiar with the problem and whose responsibility it was in the first instance to decide how long a stay was desired, after considering the various factors involved determined on a two and one-half year period, and deemed it desirable to resume the plan at mid-term of the 1960-61 school year. And we do not believe that under the circumstances the Court should disturb their judgment, even if it were inclined to do so.

In their brief in support of their motion to dismiss the original petition the plaintiffs cited a number of cases[3]

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[3] Klapprott v. United States, 335 U. S. 601; Ackermann v. United States, 340 U. S. 193; United States v. Swift & Co., supra, 286 U. S. 106; Walling v. Harnischfeger Corporation, D. C., Wis., 142 F. Supp. 202, aff'd, 7 Cir., 242 F. 2d 712; John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co., 3 Cir., 239 F. 2d 815; Federal Deposit Ins. Corp. v. Alker, 3 Cir., 234 F. 2d 113; Smith v. Kincaid, 5 Cir., 232 F. 2d 306; Morse-Starrett Products Corp. v. Steccone, 9 Cir., 205 F. 2d 244; Elgin National Watch Co. v. Barrett, 5 Cir., 213 F. 2d 776; Bigelow v. Twentieth Century-Fox

standing for the proposition that an injunction may not be dissolved or modified in the absence of a showing of unforeseeable changes in conditions which have created an exceptional situation. While none of those cases involved any problem of race relations or school integration, we do not quarrel with the general rule laid down therein, and the Board in its brief in opposition to the motion concedes "that the situation must be 'extraordinary' and that the circumstances must be 'exceptional.'"

Here, however. there has been a very radical change of situation since the former orders of this Court were entered, the occurrence and extent of which were not, to our mind, foreseeable at that time. And the situation with which the Board is now confronted is certainly exceptional and extraordinary if not, indeed, unique, that situation being complicated by the vast amount of publicity that has been given to it.

It must be remembered that when Judge Miller handed down his decision in 1956, the people of Arkansas and the legislature had not adopted the measures that we have mentioned; on the contrary, the 1955 legislature had refused to enact certain similar legislation. And when Judge Davies on September 3, 1957 ordered the Board to put its plan into effect forthwith, and when he denied the Board's application for a stay on September 7, and when he entered his order of September 20 enjoining the Governor from further interfering with the operation of the plan, the Negro students had not begun attending classes at the school, federal soldiers had not appeared upon the scene, repeated racial incidents had not occurred, the teachers had not been

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Film Corp., 7 Cir., 183 F. 2d 60; Coca Cola Bottling Co. v. Standard Bottling Co., 10 Cir., 138 F. 2d 788; United States v. Besser Manufacturing Co., D. C., Mich., 125 F. Supp. 710; Sunbeam Corporation v. Charles Appliances, D. C., N. Y., 119 F. Supp. 492.

frightened and demoralized, and educational standards had not been impaired. All of this has taken place since the final order entered by Judge Davies, and we do not believe that he foresaw the result that has come about. On the contrary, in his findings of fact and conclusions of law in connection with the injunction against the Governor he took occasion to refer to the history of peaceful race relations in Little Rock, and to state that prior to the calling out of the Guard the "faculty and the white student body at Central High School were prepared to accept the 9 colored children as fellow students." Aaron v. Cooper, D. C., Ark., 156 F. Supp. at 224.

As we have said, the fundamental position of the plaintiffs in opposing the petition appears to be that popular opposition to the plan, resulting in obstructions to its orderly operation, does not form any legal basis for affording the Board any relief in this case. In support of that argument counsel for the plaintiffs have cited the following cases: Allen v. County School Board of Prince Edward County, Va., 4 Cir., 249 F. 2d 462, cert. den. 2 L. Ed. 2d 530; Orleans Parish School Board v. Bush, 5 Cir., 242 F. 2d 156, cert. den. 354 U. S. 921; Jackson v. Rawdon, 5 Cir., 235 F. 2d 93, cert. den., 352 U. S. 925; Mitchell v. Pollock, D. C., Ky., 1 Race Rel. L. Rep. 1038; School Board of Charlottesville, Va. v. Allen, 4 Cir., 240 F. 2d 59, cert. den. 353 U. S. 910; and School Board of Newport News, Va. v. Atkins, 4 Cir., 246 F. 2d 325, cert. den., 355 U. S. 855.

Those cases unquestionably hold that a school board is not justified in failing to make a prompt and reasonable start toward the elimination of compulsory segregation merely because of popular opposition to such a step. But none of them has involved a situation like the instant one where a board has made a prompt and reasonable start,

and has actually put its plan into operation, only to find it break down in practice with a consequent impairment of educational standards and demoralization of the faculty and student body.

It is one thing to say that a school board must make a start in the direction of integration without regard to public feelings on the subject, as Judge Hutcheson said in Jackson v. Rawdon, supra; but it is quite another thing to say that when a school board has had the experiences with its plan which the Little Rock Board has had, and when, after observing the results of that plan in operation, it comes into federal court seeking not to abandon the plan or to lay it aside indefinitely, but merely a moratorium, the court must close its eyes and ears to the practical problem with which such board is confronted. Such a judicial attitude would be most unrealistic.

If popular feelings and attitudes are utterly and at all times irrelevant to the question under consideration, the Court of Appeals in affirming Judge Miller in this case would hardly have stopped to point out that the Little Rock schools had been segregated for over 80 years; nor would there have been any occasion for the Court of Appeals to say in the New Orleans case that once a school board has accepted the principle laid down in the Brown decisions, it may well be entitled to "time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil." Orleans Parish School Board v. Bush, supra, 5 Cir., 242 F. 2d at 166.

Plaintiffs have also cited Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579; Ex parte Endo, 323 U. S. 283; Morgan v. Virginia, 328 U. S. 373; and City of Birmingham v. Monk, 5 Cir., 185 F. 2d 859, cert. den., 341 U. S. 940.

Those cases hold that ordinarily enforcement of individual constitutional rights will not be delayed because of the public interests opposed to them, and that the State cannot deprive one of a constitutional right through the exercise of the police power. None of those cases, however, was a school integration case, and, as has been pointed out, the second Brown decision itself recognizes the propriety of delay in school integration under proper circumstances.

In the instant case it is not denied that under the Brown decisions the Negro students in the Little Rock District have a constitutional right not to be excluded from any of the public schools on account of race; but the Board has convincingly shown that the time for the enjoyment of that right has not yet come. That showing applies to the Negro students who were in the school last year as well as to others. While the plaintiffs contend that the rights of the students last mentioned have become vested, no authority in support of that proposition has been cited to us, and we know of no such authority, and we do not believe that such contention can be sustained.

In support of their argument that if the Board had used sufficiently firm disciplinary measures it could have controlled the situation within the school, and that by such measures it can re-establish control this coming year, the plaintiffs called to the stand the two New York educators heretofore mentioned, and their opinion evidence was in line with the plaintiffs' contentions. On the other hand, the testimony of Mr. Blossom and of Mr. Upton, was to the effect that the Board had diligently sought to preserve discipline, that it had expelled a few students and had suspended others for various periods of time, that it had undertaken to consider each case on its own merits and the effect of the action to be taken not only upon the indi-

vidual child concerned but also upon the other students in the school. It was the opinion of those witnesses that in view of the unusual situation with which they were confronted and of the source and nature of the opposition with which they were faced conditions would have been made worse rather than better by the employment of harsh disciplinary measures such as mass expulsions, and that the course that had been in fact pursued was the best possible one under the existing circumstances.

While Dr. Rogers and Dr. Salten are doubtless well qualified to express opinions as to how school matters should be handled in areas of the country with which they are familiar and in which they have had experience, neither of those gentlemen has had any public school administrative experience in the South, or any personal familiarity with the Little Rock situation; nor has either of them ever had any experience with the problems involved in the transition from segregation to integration in a state where the former has been the accepted and traditional mode of life of the people and where its existence in the public schools has had the sanction of law for so long as those schools have existed. As regards Dr. Rogers in particular, his qualifications to speak on this subject were seriously impaired, in our eyes, by his suggestion that members of the student body at Central High School might have been used, in effect, as spies upon other students there. In view of these limitations upon the qualifications of the plaintiffs' witnesses, we cannot accept their opinions in preference to that of Mr. Blossom, who is also an expert, and who formed his opinion on the ground and has based it upon his own intimate experience with the problem.

It is true that the views of Vice-principal Powell coincide with the opinions of the plaintiffs' experts, as far as the

situation inside the school is concerned; but it must be remembered that Mr. Powell had no ultimate disciplinary authority and no responsibility for any matters of overall policy; he was a subordinate employee, and it was not shown what qualifications, if any, he possesses as an expert in public school administration. He testified that he graduated from Central High School in 1940, that he was employed at the school in an undisclosed capacity in 1952, and that he has been vice-principal for boys for the past three years. His training and experience between 1940 and 1952 were not brought out in the evidence. It is also interesting to note in this connection that Mr. Powell's counterpart, Mrs. Huckaby, did not feel that the employment of stern disciplinary measures was the key to the problem. Actually, it occurs to us that Mr. Powell may well have been so close to the situation in all of its personally unpleasant aspects, that he has to some degree lost his sense of perspective in the matter.

In addition to all of the foregoing, it is well to keep in mind that the duty of maintaining discipline in the schools and of deciding what disciplinary steps should be taken is primarily the function of the school administration, and not that of the Court; and we would certainly be unwilling to substitute our judgment as to what should have been done for that of the Board in the absence of a showing that the Board had erred to such an extent as to indicate an absence of good faith on its part. There has been no such showing here.

Relative to interference from outside the school, the plaintiffs urge that the Board should have either instituted criminal prosecutions against the persons responsible, or that it should have applied for injunctive relief, as was done in the Hoxie, Arkansas, and Clinton, Tennessee, cases.

See Hoxie School District No. 46 of Lawrence County v. Brewer, D. C., Ark., 137 F. Supp. 364, aff'd, 8 Cir., 238 F. 2d 91; and Kasper v. Brittain, 6 Cir., 245 F. 2d 92, cert. den., 2 L. Ed. 2d 46. In answer to that argument Mr. Blossom testified, and he was corroborated by Mr. Upton, that the Board had determined as a matter of judgment not to resort to criminal prosecutions or to seek injunctive relief; that it was not the function of the Board to prosecute people or to seek injunctions but to run a school system, and that it had already had all of the litigation that it wanted and was not anxious for any more.

We think that the Board acted within its competency in coming to that conclusion, and we do not think that its failure to commence criminal actions or to seek injunctive relief should militate against its present petition. In the first place, the Board is not charged with the duty of commencing criminal prosecutions or of enforcing the criminal laws of the State. Secondly, by reason of the nature, source and extent of the opposition to integration in Little Rock, actions by the Board looking toward criminal prosecutions or injunctions might have aggravated rather than eased the situation. Moreover, the Board might have had a good deal of difficulty in identifying the persons causing the trouble or in establishing that their conduct constituted crimes or was of such quality as would justify the granting of injunctive relief.

As far as the Hoxie and Clinton cases are concerned, Mr. Blossom testified, and we agree, that the situation at neither of those places was comparable to the situation that has existed and now exists in Little Rock. Both Hoxie and Clinton are much smaller places than Little Rock; hence the procedures followed in the former places might not be effective in the latter.

As an illustration of the differences in situation just mentioned, attention is called to the fact that Judge Reeves' opinion in the Hoxie case discloses that the total integrated student body at Hoxie was 1025, of which only 25 students were Negroes, whereas Judge Miller's opinion in this case shows that the percentage of Negroes to whites in the high school grades at Little Rock, as of May, 1956, was .229, such percentage in the junior high grades was .246, and in the elementary grades .262, the overall percentage being .252. Moreover, Judge Reeves' opinion also makes clear that the educational facilities for Negroes at Hoxie were by no means comparable to those available to the white students, which is not the case at Little Rock.

As to the Clinton, Tennessee case, we take judicial notice of the fact that Clinton is a small town located in the mountainous country of eastern Tennessee where there are very few Negroes. In addition, the trouble there was readily traceable to one individual from outside the State, as is shown by the evidence in this case and by the opinion of the Court of Appeals in Kasper v. Brittain, supra.

It being in the public interest, including the interest of both white and Negro students at Little Rock, that we have a peaceful interlude for the period mentioned, an order is being entered permitting the Board to suspend the operation of its said plan until mid-semester of the 1960-61 school year, without the Board, or the individual members thereof, or the Superintendent of Schools being considered in contempt of this Court; and the Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

This the 20th day of June, 1958.

Harry J. Lemley
United States District Judge

Order Denying Stay

The motion of the plaintiff to stay the enforcement of the judgment in this action rendered by us on June 20, 1958, pending appeal therefrom, having been given new consideration by the court, is hereby denied.

As we understand the law, we have a discretion in this matter; and we feel that that discretion should be exercised in denying the motion, primarily for the reason that from a practical standpoint to grant this motion and stay the enforcement of our judgment would to a large extent nullify our order in the case, since it will in all probability take months to carry the case through the Court of Appeals and the United States Supreme Court; and in the meantime the situation at Central High School, which we have found to be intolerable from an educational standpoint, would continue from the beginning of the approaching session to the final ruling of the Supreme Court on the merits of the case; and for the reason stated in our opinion in said cause, we do not think that such is in the public interest, including the interest of both the white and Negro students in the Little Rock district.

The Honorable Archibald K. Gardner, Chief Judge of this circuit, in assigning us to handle the school board's plea, gave us up to and including Sept. 1, 1958, within which to try and decide the case. In order that any aggrieved party might apply for appellate relief before the beginning of the next school session, our preliminary proceeding, the trial and the preparation and filing of our opinion and order were speeded up as fast as we felt such could be done and at the same time give proper consideration to the cause.

We do not feel that the plaintiffs are deprived of the opportunity of securing an appellate ruling on their mo-

tion for supersedeas by reason of the action we are now taking, since it will be more than two months before Central High School convenes this fall, and in the meantime the plaintiffs can apply at least to the Court of Appeals of this circuit for a stay of the enforcement of our judgment of this action.

This, the Twenty-third day of June, 1958.

HARRY J. LEMLEY
United States District Judge

Opinion Dated August 27, 1956

UNITED STATES DISTRICT COURT

E. D. ARKANSAS, W. D.

Civ. A. No. 3113

JOHN AARON *et al.*,

Plaintiffs,

—v.—

WILLIAM G. COOPER *et al.*,

Defendants.

JOHN E. MILLER, *District Judge.*

This cause was tried to the court on August 15, 1956.

At the conclusion of the evidence, the case was argued orally by the able counsel for the respective parties and was submitted to and taken under advisement by the court.

The pleadings and evidence, along with the arguments and contentions of the attorneys, have been fully considered, and the court now files this opinion in lieu of formal findings of fact and conclusions of law, and incorporates herein as a part hereof the findings of fact and conclusions of law as provided by Rule 52(a), Fed. Rules Civ. Proc. 28 U. S. C. A.

On February 8, 1956, the minor plaintiffs between the ages of 6 and 21 years, through their legal representatives, filed their complaint in this court against the President and Secretary of the Board of Directors of Little Rock School District; the Superintendent of Little Rock School District; and the Little Rock School District itself.

The complaint is prolix and contains many redundant allegations. In brief, the plaintiffs alleged that the defendants conspired and will continue to conspire to deprive the minor plaintiffs and members of the class of persons that they represent of their rights, privileges, and immunities as citizens of the United States and of the State of Arkansas by providing, affording, operating, and maintaining separate, segregated public free schools within the defendant District, for the minor plaintiffs and the members of the class of persons they represent because of their race and color contrary to and in violation of the Constitution and the laws of the United States; that the defendants are threatening to continue to so conspire and to deprive the minor plaintiffs and members of their class of their constitutional rights; that the minor plaintiffs, through their legal representatives, have petitioned the defendants to cease and desist from further unlawful discrimination against the minor plaintiffs.

The prayer of the complaint is that the court enter a decree declaring and defining the legal rights and relations of the parties in the subject matter in controversy; that a permanent injunction be issued enjoining and restraining the individual defendants and their successors in office, and the defendant District, its agents, servants, employees, attorneys, and their successors in office, from executing or enforcing against the minor plaintiffs, or any member of the class of persons they represent, any constitutional provision, statute, or ordinance of the State of Arkansas, or any rule or regulation made or issued by any administrative agency, board, or commission of the State of Arkansas, that permit, require, or sanction the separation or segregation of minor plaintiffs or any member of the class of persons that they represent in the use and enjoyment of

any public school building, land, facility, privilege, or opportunity within the State of Arkansas, and particularly within the defendant District, or any public free school that is under the supervision or control of the defendants or any of them on the basis or classification of race or color.

On February 29, 1956, the defendants filed their answer to the complaint, and by their answer eliminated many of the allegations contained in the complaint. They alleged "that no State statute, no provision of the constitution of the State of Arkansas, and no rule or regulation promulgated by an administrative board of the State of Arkansas made pursuant to, or in purported reliance upon, a State statute or a State constitutional provision is involved herein * * * that they do not now rely, and have not since May 17, 1954, the date of the decision of the Supreme Court of the United States, in the case of Brown v. Board of Education, 347 U. S. 483 [74 S. Ct. 686, 98 L. Ed. 873], relied upon any State statute or State constitutional provision as authorizing segregation of the races in the public schools."

They denied that they have acted or purported to act since May 17, 1954, under any law of the State of Arkansas providing for schools on a separate and segregated basis because of race or color, or that they acted under the laws of the State of Arkansas in denying and refusing the minor plaintiffs, and the class they represent, the right and privilege of registration, enrolling, entering and attending classes and receiving instruction in the public schools operated by the defendant District.

Defendants alleged that since May 17, 1954, they have regarded as invalid the statutory provisions cited and set forth in the complaint of the plaintiffs, and that they do not rely upon said provisions in the plan they have adopted

and propose for integration. The defendants also denied that they had conspired in any manner, or were then or now conspiring, to deprive the plaintiffs and the members of the class they represent of their rights and privileges and immunities as citizens of the United States and of the State of Arkansas, by providing and maintaining separate and segregated schools contrary to and in violation of the Constitution of the United States.

The defendants admitted that the adult plaintiffs "have met with defendants and have requested immediate integration, and that they have tendered their minor children to Central High School, Technical High School, Forest Heights Junior High School, and Forest Park Elementary School", all of which are within the defendant District, and that such schools are next most proximate to the residences of the adult plaintiffs.

Defendants further answering alleged that soon after the decision of the Supreme Court was handed down on May 17, 1954, they issued to the public press a statement setting forth their attitudes as to integration, and that later the defendants prepared a Plan of Integration. A copy of the public statement and a copy of the Plan of Integration are attached to the answer and made a part thereof.

"The defendants are now in good faith endeavoring to integrate the schools of the Little Rock School District in accordance with the terms and conditions and the time schedule as set forth in said Plan. The said Plan and the reasons which make it appropriate, reasonable, and necessary in this particular locality have been explained to the adult plaintiffs and to all others who have sought information from defendants."

The defendants then alleged that the Plan is peculiarly fit and suitable for the defendant District, and will best

serve the educational needs of both races, and the personal interest of the plaintiffs in being admitted to the public schools as soon as practicable on a non-discriminatory basis; that the plaintiffs unreasonably insist on a hasty integration which will be unwise, unworkable, and fraught with danger; that would prove detrimental to the personal interest of plaintiffs and the educational needs of both races, and would unnecessarily and inevitably hinder and retard the accomplishment of integration of the schools of the defendant District.'

Thus, under the pleadings in this case there is no constitutional question involved. The defendants freely recognize their obligation to provide as soon as reasonably practicable integration in the defendant District. The primary, if not the only, question before the court is, to use the words of the Supreme Court, "the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." [349 U. S. 294, 75 S. Ct. 756]

There is no dispute between the parties as to the facts. They are as follows:

(1) The adult petitioners and minor plaintiffs are each citizens and residents of the City of Little Rock, Pulaski County, Arkansas, and are each members of the Negro race. The defendants are the Little Rock School District, its Board of Directors and it Superintendent. This is a class action by plaintiffs seeking integration of public schools in the Little Rock School District.

(2) The Little Rock School District contains 32.9 square miles. It was created in 1870 and since its inception the various schools in the District have been operated on a segregated basis.

On May 20, 1954 (three days after the Supreme Court rendered its decision in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873) the Little Rock School Board adopted a statement concerning "'Supreme Court Decision—Segregation in Public Schools." This statement was released for publication on May 23, 1954, and, inter alia, it provided:

> "* * * Until the Supreme Court of the United States makes its decision of May 17, 1954 more specific, Little Rock School District will continue with its present program.
>
> "It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed.
>
> "During this interim period we shall do the following:
>
> "1. Develop school attendance areas consistent with the location of white and colored pupils with respect to present and future physical facilities in Little Rock School District.
>
> "2. Make the necessary revisions in all types of pupil records in order that the transition to an integrated school system may serve the best interests of the entire school district.
>
> "3. Make research studies needed for the implementation of a sound school program on an integrated basis. * * *"

(3) The School Board instructed the Superintendent, the defendant, Virgil Blossom, to prepare a plan for the integration of the schools in the Little Rock School District.

Such a plan was prepared and approved by the Board on May 24, 1955 (seven days prior to the supplemental opinion of the Supreme Court in Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083). The plan is as follows:

"Little Rock Board of Education
"Plan of School Integration—
Little Rock School District

"The Supreme Court decision of May 17, 1954, which declared segregated schools unconstitutional has placed before us the most difficult educational problem of our time. A careful analysis of the following has been made.

"1. Financial ability of Little Rock School District to integrate its schools.

"2. Adequacy of present school facilities plus those to be added from $4,000,000.00 bond issue of March, 1953, plus the amount of money to be realized from the sale of the *'old Peabody School Site'* on West Capitol Ave.

"3. Proper time and method for the integration of the schools of Little Rock School District *in a manner consistent with the law as finally interpreted by the Supreme Court and acceptable to both races.*

"Our review of the three questions raised, reveal the following facts and opinions.

"1. Integration of its schools by Little Rock School District will probably place *no serious additional* financial burden on the School District.

"2. The facilities of Little Rock School District will be inadequate at the junior and senior high school

levels until such time as the three senior high schools and six junior high schools are ready for occupancy.

"3. It is our opinion that the proper time for, and method of integration is as follows:

"A. *Time of Integration*

"Integration of schools in Little Rock School District *cannot be accomplished until completion of the needed school facilities* (three senior high schools and six junior high schools) *and specific decrees have been formulated by the U. S. Supreme Court in the pending cases.*

"B. *Method of Integration*

"The method of changing from segregated to integrated schools should not be attempted simultaneously in grades one to twelve. Due to the complexity of this problem, an orderly systematically planned process should be followed. In Little Rock School District our research and study causes us to believe that the following plan charts the best course for all concerned.

"1. In our opinion integration should begin at the senior high school level. (Grades 10-12) (*First phase of program*)

"2. Following successful integration at the senior high school level, it should then be started in the junior high schools. (Grades 7-9) (*Second phase of program*)

"3. After successful integration in junior and senior high schools it should be started in elementary schools. (Grades 1-6) (*Third phase of program*)

"(*Present indications are that the school year 1957-58 may be the first phase of this program.*)

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"The Board of Education's reasons for the adoption of this plan of integration are as follows:

"1. Since our school system has been segregated from its beginning until the present time, the time required in the process as outlined should not be construed as unnecessary delay, but that which is justly needed with respect to the size and complexity of the job at hand.

"2. It is ill advised to begin this process with inadequate facilities.

"3. It is unwise to begin integration until the Supreme Court gives direction through its interpretation of the specific cases before it.

"4. By starting integration at the senior high school level the process will begin where fewer teachers and students are involved.

"5. In the adoption of a plan of integration (1) senior high school (2) junior high school (3) elementary schools) of sequential order, we provide the opportunity to benefit from our own experience as we move through each phase of this plan, thus avoiding as many mistakes as possible.

"6. The establishment of attendance areas at the elementary level (grades 1-6) is most difficult due to the large number of both students and buildings involved. Because of this fact it should be the last step in the process.

"We sincerely solicit your understanding and cooperation in the implementation of this plan, in order that the interests of all children may be better served.

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"Little Rock Board of Education
"William G. Cooper, Jr., President
"Mrs. A. E. McLean, Vice President
"Mrs. Edgar Dixon, Secretary
"Dr. Edwin N. Barron
"Foster A. Vineyard
"R. A. Lile"

(4) Since the adoption of the plan, Mr. Blossom has read and explained the plan to approximately 125 to 150 groups in an effort to obtain public acceptance of its provisions and the resulting orderly integration of the schools.

Foremost among the problems of the Little Rock School District are those of finances, structural organization, enrollment, and the selection and training of an adequate staff. These problems are not new, but they will be greatly accentuated by integration. By its plan the School Board is seeking to integrate its schools and at the same time maintain or improve the quality of education available at these schools. Some of its objectives are to provide the best possible education that is economically feasible, to consider each child in the light of his individual ability and achievement, to foster sound promotion policies, to provide necessary flexibility in the school curriculum from one attendance area to another, to select, procure, and train an adequate school staff, to provide necessary in-service training for the school staff, to provide a necessary educational program for deviates (mentally retarded, physically handicapped, speech correction, etc.), to provide the opportunity for children to attend school in the attendance area where they reside, to foster sound administrative practices, to maintain extra-curricular activities, to attempt to provide information necessary for public understanding, acceptance and support, and to provide a "teachable" group of children for

each teacher. With regard to the latter objective, it is the policy of the Board to group children with enough homogeneity for efficient planning and classroom management.

(5) As of May, 1956, the number of Negro students in the Little Rock School District was as follows: Grades 1-6, 3,303; Grades 7-9, 1,252; Grades 10-12, 929; or a total of 5,484.

The number of white students on the same date was as follows: Grades 1-6, 9,285; Grades 7-9, 3,831; Grades 10-12, 3,126; or a total of 16,242.

The Negro students had 118 teachers for grades 1-6; 42 teachers for grades 7-9; and 25 teachers for grades 10-12.

The white students had 294 teachers for grades 1-6; 145 teachers for grades 7-9; and 108 teachers for grades 10-12.

The pupil-teacher ratio for all students was approximately 26-1 in senior high and junior high, and 30-1 in grade school.

At the present time there are three high schools in the District. Central High School was built in 1926, is presently an all-white school, and will accommodate 2,500 to 2,600 students. Technical High School was built in 1944, is now an all-white school, and will accommodate 225 to 250 students. Horace Mann High School was built in 1956, is now an all-Negro school, and will accommodate 925 students. Construction has begun on the West End High School, which will accommodate 925 students and which should be completed about July 15, 1957.

The School Board intends to start integration at the high school level (grades 10-12) in the fall of 1957. In accord with this plan the Board has completely reorganized its attendance areas. At present Central and Technical High Schools have a city-wide attendance area for white students, and Horace Mann High School has a city-

wide attendance area for Negro students. Under the new plan Technical High School would remain a city-wide school for all students, but Central and Horace Mann High Schools, together with the new West End High School, would each have separate attendance areas. At this time there are no Negro students residing in the West End High School attendance area, but there are both Negro and white students residing in the Central and Horace Mann School districts.

There are now six junior high schools in the District, and another one will be needed in the near future.

(6) In preparing for integration school authorities have taken a number of steps, including the establishment of attendance areas, study of aptitudes of the children, starting of the in-service program for staff members, new promotion policies, program of information to members of the community, harmonizing student records, continuation of building program, administrative studies, and work on the guidance program.

(7) As stated in the plan and established by the evidence, the Board intends to start integration in the fall of 1957 at the high school level. The reason for starting at the high school level is that fewer students, teachers, buildings, etc., will be involved. The school authorities hope to be able to learn by experience and to be better able to enter the next phase of the plan.

The second phase of the integration plan would start two or three years after the first phase, i.e., in 1959 or 1960, and would include grades 7-9 (junior high).

The final phase of the plan would start two or three years after the start of the second phase, and would include grades 1-6. In other words, complete integration would be effected not later than 1963.

(8) The Superintendent, Mr. Blossom, along with all the other defendants and the staff of the defendant district, has worked diligently in a good faith effort to prepare and to effectuate a plan of integration that will be to the best interest of all parties and to the public.

Mr. Blossom is a highly qualified and experienced school administrator and has given much thought and study to the myriad problems relating to integration. He has had the cooperation of the Little Rock School Board in his effort to achieve integration without lowering the quality of education offered to all the school children.

It may be supererogation for the court to here review the two decisions of the Supreme Court of the United States in which the rights of the plaintiffs are declared and the duties of the lower federal courts in a case such as the instant one are set forth, but, because of the intense public interest in the question now before the court, it seems advisable for the court to do so.

On December 9, 1952, four cases from the States of Kansas, South Carolina, Virginia, and Delaware were argued under the title of Brown v. Board of Education of Topeka. The cases were not immediately determined, and were reargued December 8, 1953, and were decided on May 17, 1954, one year, five months, and eight days after the first argument. Brown v. Board of Education of Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

Following a factual outline of the cases, the Court at page 493 of 347 U. S., at page 691 of 74 S. Ct. said:

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the chil-

dren of the minority group of equal educational opportunities? We believe that it does."

In the opinion the Court considered the validity of the adoption of the Fourteenth Amendment to the Constitution of the United States in 1868, and inferentially held that the Amendment was validly adopted. The Court also reviewed the six cases that had been before it involving the "'separate but equal'" doctrine in the field of public education, and at page 495 of 347 U. S., at page 692 of 74 S. Ct. said:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Because of the great variety of local conditions in the school districts involved in those cases, the Court recognized that the formulation of a decree presented problems of considerable complexity, and the Court restored the cases to the docket and requested further argument on the form of decrees to be entered in the cases then immediately under consideration.

The cases were re-argued on April 11-14, 1955, on the question of the form of relief to be granted, and on May 31, 1955, the second and implementing opinion was rendered. Brown v. Board of Education of Topeka, 349 U. S. 294, 75 S. Ct. 753, 755, 99 L. Ed. 1083. In the latter opinion,

speaking of the opinion handed down on May 17, 1954, the Court said:

> "The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."

In the argument of April 11-14, 1955, the following questions, which the Court had propounded while it was considering its original opinion of May 17, 1954, were argued:

> "'4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> "'(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> "'(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
>
> "'5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),
>
> "'(a) should this Court formulate detailed decrees in these cases;
>
> "'(b) if so, what specific issues should the decrees reach;

> "'(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
>
> "'(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?'"

The Court, in speaking of the arguments presented on the question of the type of relief, at page 299 of 349 U. S., at page 755 of 75 S. Ct. said:

> "These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination."

The Court recognized that the school authorities would encounter many and varied problems which would have to be determined by them. In this connection the Court at page 299 of 349 U. S., at page 756 of 75 S. Ct. said:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judi-

cial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts."

The Court held that in fashioning and effectuating the decrees, the trial courts should be guided by equitable principles; that equity has always been characterized by practical flexibility in shaping its remedies and by facility for adjusting and reconciling public and private needs.

At page 300 of 349 U. S., at page 756 of 75 S. Ct. the Court said:

> "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

The Court held, 349 U. S. 300, 75 S. Ct. 756, that the school authorities should make "a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." It emphasized that the burden would rest upon the school authorities to establish that additional time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

The Court then said that the trial "courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

In the case of Briggs v. Elliott, 132 F. Supp. 776, 777, one of the original cases before the Supreme Court, the three-judge court sitting in the Eastern District of South Carolina, upon a remand of the case, said:

> "It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme

Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.

"The Supreme Court has pointed out that the solution of the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles'."

[1-4] Upon the request of the court, prior to the trial, the attorneys for the respective parties furnished the court citations of authorities upon which they were relying to support their respective contentions. The court has examined and read each of the authorities along with other decisions not cited by the attorneys. However, the decisions of the lower federal courts are of very little help, if any, in the solution of the question before the court? The primary responsibility for the implementation of the constitutional principles announced in the May 17, 1954, decision, Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, is upon the school authorities. It is the duty of the school authorities to solve the many and varied local problems. Because of the nature of the problems and the local conditions the school authorities often find

that action taken by other school districts is inapplicable to the facts with which they are dealing. It is not the duty or function of the federal courts to regulate or take over and operate the public schools. That is still the duty of the duly state-created school authorities, but the free public schools must be maintained and operated as a racially nondiscriminatory system. During the period of transition from a segregated to a nonsegregated system the school authorities must exercise good faith. They must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards should not be lowered. If the school authorities have acted and are proceeding in good faith, their actions should not be set aside by a court so long as their action is consistent with the ultimate establishment of a nondiscriminatory school system at the earliest practicable date.

The plaintiffs seek a decree declaring certain provisions of the Arkansas Constitution and statutes to be unconstitutional. These statutes and the constitutional provisions of Arkansas have been declared unconstitutional by the Supreme Court of the United States. Defendants admit that the State laws requiring segregation are unconstitutional and void. Plaintiffs also ask in their complaint that the rights of the parties and others similarly situated be declared. Here there is no controversy between the litigants as to their respective rights. Plaintiffs claim the right to be admitted to schools without discrimination because of race or color. The defendants freely admit that right. The only point at issue relates to the adequacy of

the plan of defendants for the transition from a segregated to a nonsegregated school system.

Plaintiffs also seek an injunction to compel the defendants to admit them to all free public schools without discrimination because of race or color. The defendants have declared their readiness to admit plaintiffs and others similarly situated to the schools under their control and supervision on a nonracial basis as soon as practicable. Here the rights claimed by the plaintiffs are admitted, and thus there is no threat on the part of defendants to deny plaintiffs and others similarly situated any of their constitutional rights.

[5] The history of equity jurisdiction is the history of regard for public consequences when a party seeks to employ the extraordinary remedy of injunction. Public interests have a high claim upon the discretion of a chancellor, and especially is this true under the facts in this case. Federal trial courts should exercise a sound discretion and use their authority only in exceptional cases, because of the scrupulous regard that the law has for the rightful independence of State authorities.

[6] The federal trial courts should maintain, if possible, a harmonious relation between state and federal authority where the state authority, in this instance the Board of Directors, is proceeding in good faith to discharge its duties, and thus to establish within a reasonable period of time a nonracial system of schools as required by the supreme law of the land.

As said by United States Circuit Judge, Ben F. Cameron, of the Fifth Circuit in his dissenting opinion in Brown v. Rippy, 233 F.2d 796, 802:

> "It is not reasonable that the Supreme Court would have placed primary responsibility in a group commissioned to act administratively with the expectation that this group would be hampered or vexed in accomplishing their task, severely difficult at best, by contemporaneous litigation directed towards fashioning a club to be held over their heads. Such a judicial intervention would connote a distrust of the functioning of the preliminary administrative process and would cast those conducting it under a handicap of suspicion so great as to thwart at the threshold the orderly carrying out of the procedures so plainly delineated by the Supreme Court."

[7] Learned counsel for plaintiffs earnestly contended in their oral argument that the defendants had not made a prompt and reasonable start toward full compliance with the May 17, 1954, decision of the Supreme Court; that additional time should not be allowed the Board of Directors until and unless a reasonable start toward full compliance had been made, and that in this instance such a start had not been made by the defendants. Ordinarily, the word "start" means a beginning of a journey or a course of action. It is the first motion from a place or condition; the place of beginning or point of departure. When the word is considered in context, it must be construed to embrace any necessary action taken by a Board of Directors which will, if consistently followed in good faith, lead to the admission to public schools of the plaintiffs and others similarly situated as soon as practicable on a nondiscriminatory basis. The objective cannot be obtained in an orderly manner until a variety of obstacles have been removed. The defendants are making every effort to remove those

obstacles in this case, and the court thinks they have made a prompt and reasonable start toward full compliance with the requirements of the law.

[8] The testimony of the defendant Superintendent of Schools, Mr. Virgil Blossom, is convincing that not only he but the other defendants have acted in the utmost good faith. Their sole objective has been, and is now, to faithfully and effectively inaugurate a school system in accordance with the law as declared by the Supreme Court. They are seeking and have been seeking ways and means of effectuating a transition from a segregated to a nondiscriminatory system without destroying the fundamental objectives of the system itself.

[9] This court is of the opinion that it should not substitute its own judgment for that of the defendants. The plan which has been adopted after thorough and conscientious consideration of the many questions involved is a plan that will lead to an effective and gradual adjustment of the problem, and ultimately bring about a school system not based on color distinctions.

It would be an abuse of discretion for this court to fail to approve the plan or to interfere with its consummation so long as the defendants move in good faith, as they have done since immediately after the decision of May 17, 1954, to inaugurate and make effective a racially nondiscriminatory school system.

[10] Therefore, an order should be entered approving the plan of the defendants as being adequate, and denying the prayer of the complaint of plaintiffs for a declaratory judgment and injunctive relief. The order should further provide that the court retain jurisdiction of this case for

the entry of such other and further orders as may be necessary to obtain the effectuation of the plan as contemplated and set forth herein.[1]

[1] The court is of the opinion that this order will be final and appealable, even though the court retains jurisdiction for the purpose of entering further orders. See, Pioche Mines Consolidated, Inc., v. Fidelity-Philadelphia Trust Co., 9 Cir., 191 F. 2d 399, 400; 13 Cyc. of Federal Procedure, Sec. 57.20, p. 126.

Opinion Dated April 26, 1957

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

No. 15675

JOHN AARON, a Minor, and Thelma Aaron, a Minor, by Their Mother and Next Friend, (Mrs.) Thelma Aaron, a Feme Sole, *et al.*,

Appellants,

—v.—

WILLIAM G. COOPER, M.D., as President of Board of Trustees, Little Rock Independent School District, *et al.*,

Appellees.

Before:

WOODROUGH, VOGEL and VAN OOSTERHOUT,

Circuit Judges.

VOGEL, *Circuit Judge.*

Appellants are Negro children attending the public schools of Little Rock, Arkansas. They brought this action in their own behalf and in behalf of all other Negro minors similarly situated. Appellees are the Little Rock School District, a corporation, the president and secretary of its board, and the superintendent of public schools for Little Rock. On February 8, 1956, appellants filed a complaint in the United States District Court, Eastern District of Arkansas, Western Division, asking that the court define their legal rights and that an injunction be issued against continued segregation of the races in the Little

Rock public school system. The case was tried to the court and taken under advisement. A very comprehensive opinion was filed by the trial court incorporating therein findings of fact and conclusions of law as provided for by Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. In that opinion, the District Court held that a proposed school integration plan had been promulgated by the appellees in good faith, that "the plan which has been adopted after thorough and conscientious consideration of the many questions involved is a plan that will lead to an effective and gradual adjustment of the problem, and ultimately bring about a school system not based on color distinctions". [143 F. Supp. 866.] The court held that the adoption of the plan had been prompt and that "it would be an abuse of discretion for this court to fail to approve the plan or to interfere with its consummation so long as the defendants move in good faith, as they have done since immediately after the decision of May 17, 1954, to inaugurate and make effective a racially nondiscriminatory school system". The District Court approved the plan but retained jurisdiction of the case " * * * for the entry of such other and further orders as may be necessary to obtain the effectuation of the plan as contemplated and set forth herein".

The school integration plan of the appellees for the integration of the public schools in Little Rock is stated in entirety in the District Court's opinion published in 143 F. Supp. 855, 859-860. It is accordingly unnecessary to give the details of the plan here. In substance, it is a three-phase program of intergration. Phase 1 begins at the senior high school level (grades 10-12) and is scheduled to start in the fall of 1957 upon the completion of a new senior high school building. Phase 2 begins at the junior

high school level (grades 7-9) and would start following successful integration at the senior high school level (estimated at two to three years). Phase 3 begins at the elementary level (grades 1-6) and would start after successful completion of phases 1 and 2. Complete integration is planned to be effected not later than 1963.

In this appeal, all parties recognize the mandate of the Supreme Court in Brown v. Board of Education, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, as "* * * declaring the fundamental principle that racial discrimination in public education is unconstitutional * * *." Brown v. Board of Education of Topeka, 1955, 349 U. S. 294, 298, 75 S. Ct. 753, 755, 99 L. Ed. 1083. In that decision the "separate but equal" doctrine in the field of public education was put to rest. It is on the second and implementing decision of the Supreme Court on this subject that the controversy here centers. Brown v. Board of Education of Topeka, 1955, 349 U. S. 294, 75 S. Ct. 753. The core of the second Brown decision is that, 349 U. S. at page 299, 75 S. Ct. at page 756:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitute good faith implementation of the governing constitutional principles."

What is required is that the local courts, in passing on the plans of school authorities and formulating their decrees, give weight to certain equitable principles and administra-

tive problems, while at the same time requiring a prompt and reasonable start toward full compliance with the original Brown decision declaring segregated schools inherently unconstitutional. The court stated, 349 U. S. at page 300, 75 S. Ct. at page 756:

> "Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

Appellants urge on this appeal that "there are no valid reasons of an equitable or administrative nature warranting appellees being granted an extension of time beyond September, 1957, either in starting or completing desegregation at the junior high and elementary school levels in the Little Rock School District such as proposed by appellees and approved by the judgment below".

The District Court's approval of the three-phase plan for integration came only after a finding of utmost good faith on the part of the school authorities, which finding is not challenged in these proceedings. The District Court referred to the fact that three days after the Supreme Court's opinion in the first Brown case the school board adopted a statement acknowledging their responsibility to comply and their intention to do so, and directing that a study be made and a plan prepared for the integration of the schools in Little Rock. Such a plan was prepared and approved by the board on May 24, 1955, seven days prior to the decision of the Supreme Court in the second Brown case.

During the trial in District Court the superintendent gave convincing and competent testimony to the effect that under existing conditions gradual integration of the schools was administratively advisable. Desirability of gradual as opposed to immediate integration was premised on factors referred to in the second Brown decision. The superintendent's testimony was not contradicted. Appellants offered no testimony excepting only that of the president of the school board, which supported that of the superintendent.

[1, 2] Appellants cite to us several cases where Federal Courts have used their injunctive powers to speed up or effectuate integration. Willis v. Walker, D. C. W. D. Ky. 1955, 136 F. Supp. 177; Thompson v. County School Board of Arlington County, D. C. E. D. Va. 1956, 144 F. Supp. 239; Clemons v. Board of Education, 6 Cir., 1956, 228 F. 2d 853, certiorari denied 1956, 350 U. S. 1006, 76 S. Ct. 651, 100 L. Ed. 868; Booker v. State of Tennessee Board of Education, 6 Cir., 1957, 240 F. 2d 689. These decisions serve only to demonstrate that local school problems are

"varied" as referred to by the Supreme Court. A reasonable amount of time to effect complete integration in the schools of Little Rock, Arkansas, may be unreasonable in St. Louis, Missouri, or Washington, D. C. The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places. It was on the basis of such "varied" school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions. There is here unqualified basis for the District Court's conclusions that the proposed plan constitutes a good-faith, prompt and reasonable start toward full compliance with the Supreme Court's mandate. Accordingly, we cannot say, even if we were so minded, that the District Court's conclusions were entirely erroneous and should be set aside. Nor can we say that a gradual program of integration beginning at the high school level and ultimately encompassing all grades is an unreasonable one. It may well be, in the light of future events, that the proposed program of integration extends over too long a period and that complete integration of all grades could be effected in a shorter space of time than now anticipated

by the board. In that regard, it will be noted that the District Court in its order provided for retention of jurisdiction as directed by the Supreme Court in the second Brown decision. It may be that in the future, as the plan of integration begins to operate, a showing could then be made to the effect that more time was being taken than was necessary. Upon such a finding, the District Court would have the power to see that the plan of gradual integration was accelerated at a greater rate than now proposed. That remains for future determination. Having in mind the formula outlined by the Supreme Court and bound, as we are, by Rule 52(a), Federal Rules of Civil Procedure, we hold that in the light of existing circumstances the plan set forth by the Little Rock School Board and approved by the District Court is in present compliance with the law.

Jurisdiction of this case shall be retained by the District Court to insure full opportunity for further showing in the event compliance at the "earliest practicable date" ceases to be the objective. The prayer for a declaratory judgment and injunctive relief was properly denied.

Affirmed.